Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ALLEN D. ADAMS, II, et al.,
Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION and PICHIN CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Pension Benefit Guaranty Corporation (hereinafter referred to as "PBGC") have the authority to waive or compromise the liability imposed on the sponsor of a defined benefit pension plan by § 1362 of the Employee Retirement Income Security Act?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following individuals were appellants in the Court of Appeals for the District of Columbia Circuit and are petitioners in this Court:

Richard P. Barthelemy
Eugene H. Frank
Peter W. McCue III
Arthur L. Melnick
Gerald N. Pilot
Walter P. Sullivan

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Overview 2

B. The Termination of the TWA Pension Plans 4

C. The ALPA Lawsuit 5

D. Petitioners' Lawsuit 7

REASONS FOR GRANTING THE PETITION 8

I. The Structure of the Pension Guaranty System 9

A. Termination Liability 10

B. The Transition Provisions 14

II. The PBGC Cannot Change the Amount of the Termination Liability Fixed by Congress 15

III. The Position of the PBGC Endangers the Existence of the Pension Guaranty System Created by Congress 17

CONCLUSION 19

APPENDIX

Order Denying Reconsideration ..... App. 1

Judgment Order Affirming the Order of the District Court ..... App. 3

Opinion of the District Court ..... App. 5

29 U.S.C. § 1302 ..... App. 20

29 U.S.C. § 1341 ..... App. 26

29 U.S.C. § 1342 ..... App. 40

29 U.S.C. § 1362 ..... App. 48

29 U.S.C. § 1367 ..... App. 53

TABLE OF AUTHORITIES

CASES:

Airline Pilots Ass'n, International v. Pension Benefit Guaranty Corp.,
193 F.Supp 2d. 209 (D.D.C. 2002) 5

Allied Pilots Ass'n. v. Pension Benefit Guaranty Corp.,
334 F.3d 93 (D.C. Cir. 2003) 6, 7, 8

Nachman Corp. v. PBGC,
446 U.S. 359 (1980) 9, 11

Pierce v. Underwood,
487 U.S. 552 (1988) 16

U.S. v. Monsanto,
491 U.S. 600 (1989) 16

STATUTES AND RULES:

28 U.S.C. § 1254 1

28 U.S.C. § 1331 2

28 U.S.C. § 2101 1

29 U.S.C. § 1132(c)(1) 2

29 U.S.C. § 1132(f) 2

29 U.S.C. §§ 1301 *et seq* 1, 9

29 U.S.C. § 1301(a)(14) 2

29 U.S.C. § 1302 9

29 U.S.C. § 1302(a) 9

29 U.S.C. § 1302(b)(2) 17

29 U.S.C. § 1303(f) 2

29 U.S.C. § 1304(f)(4) 15, 17

29 U.S.C. § 1306(a)(3)(A)(i) 10

29 U.S.C. § 1306(a)(3)(E) 10

29 U.S.C. § 1322 10

29 U.S.C. § 1341 5

29 U.S.C. § 1341(b) 10

29 U.S.C. § 1341(c) 3, 10, 16

29 U.S.C. § 1342 ..... *passim*

29 U.S.C. § 1342(a) 5

29 U.S.C. § 1342(a)(2) 3

29 U.S.C. § 1342(c) 4

29 U.S.C. § 1347 5

29 U.S.C. § 1362 ..... *passim*

29 U.S.C. § 1362(b) 13

29 U.S.C. § 1362(b)(1)(A) 15

29 U.S.C. § 1362(b)(3) 17

29 U.S.C. § 1367 ..... 7, 17

29 U.S.C. § 1369 7

29 U.S.C. § 1370(c) 2

Pub. L. 93-406, Title IV, § 4004(f)(4), Sept. 2, 1974, 88 Stat. 1029 15

Pub. L. 93-406, Title IV, § 4062, Sept. 2, 1974, 88 Stat. 1029 13

Pub. L. 99-272, Title XI, §11011, Apr. 7, 1986, 100 Stat. 82 17

Pub. L. 99-272, Title XI, § 11016(c)(6), Apr. 7, 1986, 100 Stat. 82, effective Jan. 1, 1986 15

Pub. L. 100-203, Title IX, § 9313(b)(6), Dec. 22, 1987, 101 Stat. 1330 17

Fed. R. Civ, P. 12(b)(6) 7

S. Ct. Rule 13.1 1

OTHER AUTHORITIES:

1974 U.S.C.C.A.N. 4862..... 12

1974 U.S.C.C.A.N. 5185..... 11

PBGC press release 05-36, http://www.pbgc.gov/media/news-archive/2005/pr05-36.html..... 18

OPINIONS BELOW

The order of the United States Court of Appeals for the District of Columbia Circuit denying *en banc* reconsideration entered on April 28, 2006 is not officially reported and is reproduced at App. 1. The order of the United States Court of Appeals for the District of Columbia Circuit affirming the District Court entered on January 27, 2006 is reported at 170 Fed. Appx. 142 and is reproduced at App. 3 - 4.

The decision and order of the United States District Court for the District of Columbia dismissing plaintiffs' amended complaint dated August 25, 2004 is reported at 332 F. Supp.2d 231 and reproduced at App. 5 –19.

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia Circuit denying *en banc* reconsideration was entered on April 28, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the order denying *en banc* reconsideration. This Court has jurisdiction to review the order of the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions of Title IV of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1301 *et seq.* (hereinafter referred to as "ERISA") are set out at App. 20 – 54.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 and 29 U.S.C §§ 1132(c)(1) and (f), 1303(f) and 1370(c).

A. Overview

In the early 1950s, Trans World Airlines (hereinafter referred to as "TWA") and the Air Line Pilots Association, International, (hereinafter referred to as "ALPA"), the union representing TWA's pilots, negotiated a defined benefit pension plan for the TWA pilots known as the "Pilots' A-Plan."

In or around 1986, after substantial concessions by ALPA and the other labor organizations representing TWA's employees, Carl Icahn purchased TWA. Some months later, TWA acquired Ozark Airlines, along with Ozark's routes and pilots.

On or about January 31, 1992, TWA filed a voluntary petition under Chapter 11 of the Federal Bankruptcy Code. At that time, the Pilots' A-Plan covered flight engineers, first officers, and captains. A second defined benefit pension plan covered most other eligible TWA employees.

During the bankruptcy proceeding, the PBGC filed a contingent Proof of Claim of approximately $1,124,000,000 for the liability imposed on a plan sponsor and its controlled group by § 1362 of ERISA. PBGC estimated that $444,700,000 of the liability was attributable to underfunding in the Pilots' A-Plan. At the time PBGC filed its Proof of Claim, TWA and its controlled group,[1]

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[1] *See* 29 U.S. C. § 1301(a)(14).

which consisted of companies owned by Icahn, had sufficient assets to satisfy PBGC's claim in full. After the PBGC filed its Proof of Claim, negotiations took place among TWA, the PBGC, the Official Unsecured Creditors Committee, Icahn and other interested parties in an attempt to agree upon a plan of reorganization for TWA.

The parties reached an agreement known as the "Comprehensive Settlement Agreement" (hereinafter referred to as the "CSA"), to resolve all the issues surrounding TWA's reorganization in late 1992. As relevant here, the CSA provided that Icahn would form a new entity to assume and maintain the TWA pension plans as the sole plan sponsor, contributing sponsor and plan administrator for purposes of ERISA and the Internal Revenue Code. The entity formed by Icahn is known as "Pichin Corporation" (hereinafter referred to as "Pichin").

Pursuant to § 7.2 of the CSA, Pichin became responsible to meet all minimum funding requirements applicable to the TWA pension plans less any amounts paid by TWA pursuant to other provisions of the CSA. In § 8.2 of the CSA, the PBGC agreed that it would not terminate the TWA pension plans except under 29 U.S.C. § 1342(a)(2) or at the request of Pichin if one or more "Significant Events" as defined in § 10 of the CSA occurred.

The CSA provides that the termination of the TWA pension plans based upon the occurrence of a Significant Event under § 10 of the CSA would be carried out in accordance with 29 U.S.C. §§ 1341(c) or 1342. Section 10 also provides that upon the termination of the TWA Pension Plans, "...the liability under Title IV of ERISA of Pichin, and all members of its controlled group, shall be limited, individually and collectively, to an obligation to make eight

annual payments of $30 million each to the PBGC, commencing eighteen months after the date on which the TWA pension plans are terminated." **In other words, the PBGC agreed to give up its collectable claim of $1,124,000,000 for termination liability in exchange for Pichin and Icahn's promise to pay $240,000,000 over eight and one half years beginning at a time unilaterally selected by Icahn.**

The Bankruptcy Court approved the CSA on December 30, 1992. The CSA became effective as of January 5, 1993.

B. The Termination of the TWA Pension Plans

On or about December 1, 2000, TWA, at Pichin's direction, sent a notice to the participants in the TWA pension plans stating that Pichin intended to request termination of the TWA pension plans, effective January 1, 2001. On or about December 14, 2000, Pichin sent a letter to the PBGC requesting that PBGC terminate the TWA pension plans pursuant to § 1342 of ERISA because of the occurrence of a Significant Event as set forth in the CSA.

On January 2, 2001, the PBGC entered into an agreement with Pichin, pursuant to which the TWA pension plans, including the Pilots' A-Plan, were terminated effective January 1, 2001. The termination of the Pilots' A-Plan resulted in the immediate reduction of the monthly benefit paid to petitioners and other retired TWA pilots. The PBGC, in terminating the Pilots' A-Plan at Pichin's request, acted solely on the basis of Pichin's written request for termination under the terms of the CSA and PBGC's authority under 29 U.S.C. § 1342(c).

C. The ALPA Lawsuit

On or about December 29, 2000, ALPA and two retired TWA pilots filed suit in the district court for the District of Columbia against Pichin, the PBGC and Icahn Associates Corporation. In their suit, the plaintiffs alleged that the PBGC had acted in an arbitrary and capricious manner when it terminated the Pilots' A-Plan because the PBGC had not complied with the requirements set forth in 29 U.S.C § 1342(a). Specifically, the plaintiffs alleged that the PBGC was obligated to meet the requirements set forth in 29 U.S.C. § 1341 in 2000 and that PBGC could not rely on the administrative record made in 1992. The plaintiffs demanded that the court issue an injunction prohibiting PBGC from terminating the Pilots' A-Plan or, if the pension plan had already been terminated, an order restoring the plan under 29 U.S.C. § 1347 and money damages.

On cross motions for summary judgment, the district court concluded that the administrative record developed by the PBGC in 1992 was sufficient to justify the PBGC's termination of the Pilots' A-Plan in 2001 since by its terms the CSA did not terminate the pension plans but merely postponed the time at which the PBGC would terminate the pension plans.[2]

The plaintiffs appealed the decision of the district court to the Court of Appeals for the District of Columbia

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[2] *See Airline Pilots Ass'n, International v. Pension Benefit Guaranty Corp.*, 193 F.Supp. 2d 209 (D.D.C. 2002).

Circuit.[3] As described by the Court of Appeals, in the district court:

> ...the pilots argue[d] (1) that the PBGC failed to make an administrative determination in 1992 that the TWA pension plans satisfied ERISA's involuntary termination criteria and (2) that even if the PBGC made a proper determination in 1992, it acted arbitrarily and capriciously by failing to make a second such determination in 2001 before formally terminating the plans. The PBGC replies (1) that it in fact made the requisite determination in 1992 and (2) that ERISA authorizes it to enter into agreements, like the CSA, which postpone -- possibly indefinitely -- execution of the 1992 termination decision.

Allied Pilots, 334 F.3d at 97. The Court of Appeals affirmed the decision of the district court, finding that the PBGC had made the necessary administrative findings in 1992 to justify termination of the Pilots' A-Plan and that the PBGC had the statutory authority to postpone the plan termination date as part of a liability settlement agreement such as the CSA. The court observed:

> The PBGC's general authority to enter into liability settlements comes from ERISA section 4067, which empowers the PBGC "to make arrangements with [plan] sponsors and members of their controlled groups who are or *may become* liable under [the statute]

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[3] *See Allied Pilots Ass'n v. Pension Benefit Guaranty Corp.*, 334 F.3d 93 (D.C. Cir. 2003).

> for payment of their liability." 29 U.S.C. § 1367 (emphasis added).

334 F.3d at 98.

D. Petitioners' Lawsuit

Petitioners (hereinafter referred to collectively as the "Adams plaintiffs") are all retired TWA pilots. On or about May 15, 2002, they filed suit against the PBGC, Pichin, ALPA and various individual officials of ALPA in the district court for the District of Columbia raising in Count I of their complaint the issue raised by ALPA in its earlier lawsuit. Shortly after the Adams plaintiffis filed suit, the district court stayed further proceedings in the Adams litigation pending the Court of Appeals' decision in *Allied Pilots*.

After the Court of Appeals announced its decision in *Allied Pilots*, the Adams plaintiffs filed an amended complaint. The First Amended Complaint alleges the history of the TWA bankruptcy and the relevant provisions of the CSA as set forth above. Count I of the First Amended Complaint alleges that the primary purpose of § 10 of the CSA was to avoid the termination liability imposed on a plan sponsor by 29 U.S.C. § 1362 in violation of 29 U.S.C. § 1369. In ¶ 80 of their First Amended Complaint, the Adams plaintiffs further allege that the PBGC had no lawful authority "...to forgive or to compromise the liability for unfunded benefit liabilities...."

Both Pichin and PBGC filed motions to dismiss the First Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted the motions on August 25, 2004, primarily relying on the Court of Appeals' earlier decision in *Allied Pilots*. The Court of Appeals affirmed the district court's decision

based upon its earlier holding in *Allied Pilots* that PBGC had broad authority to enter into liability settlements.

REASONS FOR GRANTING THE PETITION

In the thirty years since ERISA was enacted, the pension benefit guaranty system administered by the PBGC has become an integral part of the nation's economy touching the lives of millions of Americans. According to PBGC's Performance and Accountability Report for Fiscal Year 2005, as of September 30, 2005, PBGC covered 44.1 million workers in over 30,000 active pension plans and was providing benefits to 1.3 million workers whose pension plans had failed. During 2005, PBGC took over responsibility for 120 additional pension plans, thereby increasing its deficit by $10.7 billion. As of September 30, 2005, PBGC estimated that it was "reasonably possible" that plans with an additional $108 billion in unfunded liabilities would fail in the future.

As a result of PBGC's current policies, more and more companies are shifting their massive unfunded pension liabilities to the PBGC and PBGC's financial condition is deteriorating. Left unchecked, these policies will ultimately require a multi-billion dollar bail out of the pension guaranty system by American taxpayers. This case presents a critical question central to the operation of the pension guaranty system crafted by Congress as set forth in Title IV of ERISA. Simply put, the issue is whether Congress reserved to itself the right to dictate the terms under which the sponsor of a pension plan with unfunded liabilities can shift those liabilities to the PBGC or whether it granted to the PBGC the unlimited power and authority to strike whatever deal PBGC's bureaucrats found most attractive when agreeing to assume responsibility for billions of dollars of unfunded pension liabilities.

I. The Structure of the Pension Guaranty System

The enactment of ERISA on September 2, 1974 was the culmination of almost a decade of study and debate by Congress on how to improve various aspects of private pension plans in the United States. One of the forces driving Congressional action was the all too familiar scenario where beneficiaries did not receive promised benefits because their pension plans had not accumulated sufficient assets before being terminated by the employer. To combat this problem, Congress created the plan termination insurance program set forth in Title IV of ERISA, 29 U.S.C. §§ 1301 *et seq.* *Nachman Corp. v. PBGC*, 446 U.S. 359, 362 (1980).

The system is administered by the PBGC, an independent government corporation whose board is composed of the Secretary of the Treasury, the Secretary of Labor and the Secretary of Commerce.[4] The PBGC's main responsibilities are:

> (1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,
> (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and
> (3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.[5]

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[4] 29 U.S.C. § 1302.

[5] 29 U.S.C. § 1302(a).

The PBGC is primarily funded by premiums paid by employers who maintain defined benefit pension plans. The basic premium for single employer pension plans is currently $30.00 per employee per year[6] plus an additional premium as set forth in 29 U.S.C. § 1306(a)(3)(E) for any year in which the plan has an unfunded current liability.

A sponsor of a single employer defined benefit plan may apply to the PBGC for a voluntary "standard termination" of its plan pursuant to 29 U.S.C. § 1341(b) or a "distress termination" under § 1341(c). The primary difference between a standard termination and a distress termination is that in the former, the plan has sufficient assets to cover its liabilities on the termination date while in the latter case, it does not. In a distress termination, the PBGC becomes obligated to pay to retired plan participants those benefits guaranteed under 29 U.S.C. § 1322.

In addition to a voluntary termination initiated by the plan sponsor, § 1342 gives the PBGC the authority to apply to a district court for an order involuntarily terminating a single employer defined benefit pension plan. In this case, as in a voluntary distress termination, PBGC becomes obligated to pay those benefits guaranteed under §1322 to retired plan participants.

A. Termination Liability

As Congress considered the proposed insurance program, it quickly became concerned with the possibility that a solvent employer might deliberately terminate a pension plan knowing that the insurance program would then become responsible for paying ongoing benefits.

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[6] 29 U.S.C. § 1306(a)(3)(A)(i). Prior to January 1, 2006, the basic premium was $19.00 per employee per year.

Similarly, Congress was concerned that employers would agree to overly generous pension benefit increases that they could not afford, knowing that the insurance program would ultimately pay for these benefits. *Nachman*, 446 U.S. at 367 at n.12. To control this problem, Congress developed the concept of "termination liability." In commenting on the Conference Report on H.R. 2, the House bill that was ultimately enacted by Congress, Senator Williams, the Chairman of the Senate Committee on Labor and Public Welfare, discussed the termination insurance provisions of the bill and observed:

> Since there would be a possibility of abuse by solvent employers who terminate a plan and shift the financial burden to the insurance program, notwithstanding their own financial ability to continue funding the plan, the conference bill imposes liability on employers whose plans terminate, to reimburse the program for benefits paid by the corporation. This liability extends to 30 percent of the employer's net worth. However, the bill does provide that employers will be permitted to exercise the option to obtain additional insurance to cover such contingent liability.

1974 U.S.C.C.A.N. 5185. Similarly, the Committee report accompanying S.4, the Senate version of the bill, stated:

> The Committee recognizes that in order to provide adequate protection to employees against loss of vested benefits owing to premature plan termination, it is necessary for the insurance program to cover all forms of plan termination regardless of the

> circumstances giving rise to the termination. The Committee also recognized that some degree of employer liability was essential where the employer was not insolvent at the point of plan termination in order to preclude abuse by shifting the financial burden to the plan termination insurance program despite the fact that the employer had available funds to continue funding the plan.

1974 U.S.C.C.A.N. 4862. The Committee described its solution to the problem as follows:

> Having determined that participation in the plan termination insurance program was essential for all plans, and that some degree of employer liability was necessary, the question of the degree of such liability becomes important. The Committee had concern that if the degree of liability was absolute to the extent of the employer's assets, it might drive some employers to the brink of bankruptcy, impose substantial economic hardship, or discourage the establishment of plans or the reasonable liberalization of benefits.
>
> Accordingly, the Committee endorsed a formula of employer liability which requires the employer to reimburse the plan termination insurance program for the total amount of insurance paid, but in no event greater than 50% of employer's net worth at time of plan termination.

Id.

ERISA, as finally enacted in 1974, provided in § 1362(b) that:

> Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of –
>
> (1) The excess of –
>
> (A) The current value of the plan's benefits guaranteed under this title on the date of termination over
>
> (B) The current value of the plan's assets allocable to such benefits on the date of termination, or
>
> (2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date, computed without regard to any liability under this section.

Pub. L. 93-406, Title IV, § 4062, Sept. 2, 1974, 88 Stat. 1029.

As of the date of the CSA, the relevant portion of § 1362 provided:

> **§ 1362. Liability for termination of single-employer plans under a distress termination or a termination by corporation**
>
> (a) In general
>
> In any case in which a single-employer plan is terminated in a distress termination under section 1341(c) of this title or a termination otherwise instituted by the corporation under section 1342 of this title, any person who is, on the termination date, a contributing sponsor of the plan or a member of such a

contributing sponsor's controlled group **shall incur liability** under this section. The liability under this section of all such persons shall be joint and several. The liability under this section consists of–

(1) Liability to the corporation, to the extent provided in subsection (b) of this section, and

(2) Liability to the trustee appointed under subsection (b) or (c) of section 1342 of this title, to the extent provided in subsection (c) of this section.

(b) Liability to corporation-

(1) Amount of liability

(A) In general

Except as provided in subparagraph (B), the liability to the corporation of a person described in subsection (a) of this section **shall** be the total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan, together with interest (at a reasonable rate) calculated from the termination date in accordance with regulations prescribed by the corporation. (emphasis added)

B. The Transition Provisions

In enacting ERISA, Congress recognized that the new law would affect every private pension plan in the United States. To minimize the hardship the new provisions might cause sponsors of existing pension plans, Congress provided special transition rules to phase in some of ERISA's more burdensome obligations. For example, in

§ 1304(f)(4)[7] of the Act, Pub. L. 93-406, Title IV, § 4004(f)(4), Sept. 2, 1974, 88 Stat. 1029, Congress gave the PBGC specific statutory authority to waive the termination liability imposed by § 1362, **but for a limited time period only**. § 1304(f)(4) provided:

> (f) In addition to its other powers under this title, for only the first 270 days after the date of enactment of this Act the corporation may. . .
>
> (4) **waive** the application of the provisions of sections 4062, 4063, and 4064 to, **or reduce the liability** imposed under such sections on, any employer with respect to a plan terminating during that 270 day period if the corporation determines that such waiver or reduction is necessary to avoid unreasonable hardship in any case in which the employer was not able, as a practical matter, to continue the plan. (emphasis added)

Section 1304(f)(4), now repealed, is the one and only instance in which Congress gave PBGC the authority to waive or modify the amount of termination liability.

II. The PBGC Cannot Change the Amount of the Termination Liability Fixed by Congress

As set forth in § 1362(b)(1)(A), the "...liability to the corporation of a person described in subsection (a) of this section **shall** be the total amount of the unfunded benefit

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[7] Section 1304 was repealed by Pub. L. 99-272, Title XI, § 11016(c)(6), Apr. 7, 1986, 100 Stat. 82, effective Jan. 1, 1986.

liabilities... together with interest... calculated from the termination date..." The language of this section leaves no room for discretion, because the word "shall" is a mandatory command not subject to discretion. This Court in the context of a housing subsidy dispute held that the word "shall" must be interpreted as a mandatory command, *Pierce v. Underwood*, 487 U.S. 552, 569-70 (1988). A year later this Court, in considering whether the Comprehensive Forfeiture Act of 1984, 98 Stat. 2044, as amended, 21 U.S.C. § 853(a), required forfeiture of assets to be used to pay a defendant's attorneys fees, observed that in using the word "shall," "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied." *U.S. v. Monsanto*, 491 U.S. 600, 607 (1989).

In the instant matter, the unambiguous language of § 1362 and the legislative history set forth above leave no doubt that Congress has fixed, by operation of law, and without exception, the amount of termination liability imposed on a plan sponsor and members of its controlled group either in a § 1341(c) distress termination or when the PBGC exercises its statutory authority under § 1342 and involuntarily terminates a single employer pension plan. Imposition of termination liability cannot be avoided by the plan sponsor and, **except for the first 270 days after ERISA was enacted,** the amount of the termination liability imposed cannot be modified by the PBGC.

Despite the plain language used by Congress in § 1362, the PBGC has steadfastly maintained that it has the power to compromise a plan sponsor's termination liability. PBGC has repeatedly argued that it must have the authority to compromise the amount of termination liability because any other system "...would be totally impracticable" and "PBGC would be required to litigate every single case to

the bitter end, regardless of the cost or risk involved."[8] In support of its contention, PBGC has pointed to § 1302(b)(2)'s "sue and be sued" language, the addition of subsection (b)(3) to § 1362 in 1986[9] and the addition of the phrase "or may become" to § 1367 in 1987.[10] PBGC has not explained why Congress thought it necessary to include § 1304(f)(4) when it enacted ERISA if it had already granted PBGC the same authority in § 1302(b)(2) or why Congress found it necessary to again give PBGC the same authority in 1986 and again in 1987. PBGC has also not offered an explanation as to why Congress, if it in fact intended to modify § 1362's mandatory language, did so with language subject to various interpretations instead of with the plain language it previously used in § 1304(f)(4).

III. The Position of the PBGC Endangers the Existence of the Pension Guaranty System Created by Congress

As envisioned by Congress and implemented through the language of § 1362, the liability imposed on a plan

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[8] Brief of Appellee, Pension Benefit Guaranty Corp., filed in the instant matter in the United States Court of Appeals for the District of Columbia Circuit at page 15.

[9] Pub. L. 99-272, Title XI, §11011, Apr. 7, 1986, 100 Stat. 82, added § 1362(b)(3) which states:

> **Alternative Arrangements** --The corporation and any person liable under this section may agree to alternative arrangements for the satisfaction of liability to the corporation under this subsection.

[10] Pub. L. 100-203, Title IX, § 9313(b)(6), Dec. 22, 1987, 101 Stat. 1330.

sponsor serves two purposes: it reduces the amount the PBGC has to spend from its premium income to make the guaranteed payments required by the Act and it deters plan sponsors from shifting their underfunded pension plans to the PBGC. Over the last thirty years, as it freely admits, the PBGC has on many occasions compromised the amount of the liability imposed by § 1362 either because it was unwilling to litigate the accuracy of its liability determinations or because it determined that it needed to do so to permit the plan sponsor to emerge from bankruptcy. In the instant case, PBGC did not want to litigate the accuracy of its liability determination with Icahn and ultimately decided as a matter of economic policy that rather than pursue Icahn for almost $1.2 billion in termination liability, it was more important to compromise its § 1362 liability claim so TWA could be reorganized.

PBGC and the Court of Appeals justify and validate PBGC's decisions by pointing out that TWA continued to exist for eight more years and the maximum benefit payable to TWA retirees by PBGC increased by 44%. Yet others believe as a matter of economic policy that it would have been better for PBGC to pursue its § 1362 claim against Icahn and let TWA be liquidated, thereby reducing PBGC's deficit.

Most recently in April 2005, as part of the United Airlines bankruptcy, PBGC has again compromised its § 1362 liability claim. Under the terms of the settlement, as described in an April 22, 2005 press release[11] "...PBGC [has agreed to] terminate and become trustee of the company's four pension plans and the agency's claims against the company [will] be settled." The settlement

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[11] Press release 05-36 is available on PBGC's web site at http://www.pbgc.gov/media/news-archive/2005/pr05-36.html.

unfunded liabilities in exchange for up to $1.5 billion in notes and convertible stock in the reorganized UAL Corp. The settlement will increase PBGC's deficit by at least $4.1 billion. News reports indicate that other airlines such as Delta, Northwest and possibly American, in order to remain competitive, will likely attempt to shift their pension obligations to PBGC as well.

This Court should grant this petition to consider the important question raised by this case - whether Congress gave PBGC the unlimited and unreviewable discretion to make whatever deal it wants with a company looking to shift its pension obligations to the PBGC or whether the provisions of § 1362 set forth the only terms under which the sponsor of a pension plan may shift its unfunded liabilities to PBGC. It seems very likely that in the next few years even more companies with substantially underfunded pension plans will look to shift those liabilities to PBGC. The terms under which such transfers occur will dictate whether the PBGC will be able to meet its statutory obligations to the millions of retired workers whose pensions it guarantees. If PBGC continues to act beyond its statutory authority, just as day follows night, the pension payments so many Americans rely on will be placed in jeopardy while America's taxpayers will be saddled with a multi-billion dollar PBGC bailout.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

David S. Dessen,
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Attorney for Petitioner

United States Court of Appeals,
For The District Of Columbia Circuit

No. 04-5333 **September Term, 2005**

02cv00945
03cv01870

Filed On: April 28, 2006

Allen D. Adams, II, et al.,
Appellants

v.

Pension benefit Guaranty Corporation, et al.,
Appellees.

Consolidated with 04-5334, 04-5380

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland*, Brown, and Griffith, Circuit Judges

ORDER

Upon consideration of appellant/cross-appellee's petition for rehearing en banc, the responses thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition by denied.

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* Circuit Judge Garland did not participate in this matter.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: /s/
Michael C. McGrail
Deputy Clerk

**United States Court of Appeals,
District of Columbia Circuit.**

Allen D. ADAMS, II, et al.,
Appellants

v.

PENSION BENEFIT GUARANTY CORP.,
Pichin Corp.,
Appellees.

Nos. 04-5333, 04-5334.

Jan. 27, 2006.

Rehearing En Banc Denied April 28, 2006.

Appeal from the United States District Court for the District of Columbia, (No. 02cv0945), (No. 03cv1870).

David Samuel Dessen, Dessen Moses & Sheinoff, Willow Grove, PA, for Appellants.

Aula J. Connelly, Jeffrey B. Cohen, Pension Benefit Guaranty Corporation , (PBGC) Office of General Counsel, David P. Gersch, Andrew Tanner Karron, John D. Daley, Graham James Jenkins, Arnold & Porter LLP, Washington, DC, for Appellees.

Before GINSBURG, Chief Judge, RANDOLPH, Circuit Judge, and EDWARDS, Senior Circuit Judge.

JUDGMENT

PER CURIAM.

This appeal was considered on the record from the United

States District Court for the District of Columbia and on the briefs and arguments of the parties. It is

ORDERED AND ADJUDGED that the judgment of the district court be affirmed for the reasons stated in the opinion of the district court, see *Adams v. Pension Benefit Guar. Corp.*, 332 F.Supp.2d 231 (D.D.C.2004), except insofar as the district court based Part IV.C of its decision upon the alternative ground of res judicata.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See Fed. R.App. P. 41(b); D.C.Cir. Rule 41.

United States District Court,
District of Columbia.

No. CIV.A. 02-0945(RCL)

Allen D. ADAMS II, et al.,
Plaintiffs,

v.

PENSION BENEFIT GUARANTY CORPORATION, et al.,
Defendants

Aug. 25, 2004.

David S. Dessen, Dessen, Moses & Sheinoff, Philadelphia, PA, for Plaintiffs.

Andrea Margaret Wong, Andrew Tanner Karron, David P. Gersch, John Daniel Daley, Arnold & Porter, LLP, Washington, DC, for Defendants.

MEMORANDUM OPINION

LAMBERTH District Judge.

This matter comes before the court on defendant Pension Benefit Guarantee Corporation's ("PBGC") and defendant Pichin's motions to dismiss plaintiffs' First Amended Complaint. Defendants move to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(6) on grounds that the complaint fails to state a claim upon which relief may be granted. Plaintiffs submitted memoranda in opposition, and the defendants filed replies to plaintiffs' oppositions. Upon consideration of the parties' filings, the relevant law and the facts of this case, this Court finds that

the defendants' motions to dismiss should be **GRANTED** in accordance with this memorandum opinion.

I. Introduction

This case arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* The plaintiffs, retired airline pilots seek declaratory and injunctive relief based upon the termination of Trans World Airlines's ("TWA") pilot retirement plan ("Pilots' A-Plan"). Specifically, plaintiffs assert that portions of a Comprehensive Settlement Agreement ("CSA") between TWA, the TWA pilots' union, the financier Carl Icahn and various entities associated with Icahn (the "Icahn entities"), including defendant Pichin Corporation, and the PBGC comprise a transaction to evade liability under ERISA. Plaintiffs also assert that both the Pichin Corporation ("Pichin") and the PBGC breached their fiduciary duties owed to the participants and beneficiaries of the plan.

II. Background

A. The Comprehensive Settlement Agreement

In January 1992, TWA filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware. At the time of the 1992 bankruptcy petition, there were two identified pension plans covering TWA's employees ("the pension plans"). One, the Pilots' A-Plan, covered pilots and the other covered most other TWA employees. Pls.' First Am. Compl. ¶ 30. According to plaintiffs, there were unfunded benefit liabilities for the pension plans in the amount of $1.124 billion at the time of the bankruptcy proceeding. Of this liability, $444,700,000 was attributable to unfunded benefit liabilities for the Pilots' A-Plan. Id. ¶ 31. In or around October of 1992,

PBGC announced its intention to terminate TWA's pension plans. In order to postpone or prevent termination of the plans, all parties agreed upon the terms of the CSA. The CSA provided, *inter alia*, that:

(1) Icahn would loan TWA $200 million; (2) Pichin would sponsor the pension plans instead of TWA. Thus, Icahn became responsible for making the minimum funding contributions and TWA was released from all liability for the plans; (3) TWA was to issue $300 million in notes to make part of the annual pension plan contributions in compliance with ERISA and provisions of the Internal Revenue Code; (4) PBGC would not terminate the plans except under ERISA § 4042(a)(2), 29 U.S.C. § 1342(a)(2) or at the request of the Icahn sponsor; (5) PBGC would, at Icahn's request, terminate the plans if a "*Significant Event*," as defined in the CSA, occurred, and (6) that in the event of a Significant Event requiring termination, Icahn's liability to PBGC would be limited to $240 million.

See *Allied Pilots Ass'n v. PBGC*, 334 F.3d 93, 96 (D.C.Cir.2003) (emphasis in original) (quoting *Air Line Pilots Ass'n v. PBGC*, 193 F.Supp.2d 209, 213 (D.D.C.2002)); Plaintiffs' First Amended Complaint ¶¶ 37-47. The bankruptcy court approved the CSA as part of TWA's Chapter 11 reorganization plan on December 30, 1992. See *In re Trans World Airlines, Inc.*, No. 92-115 (Bankr.D.Del. Dec. 30, 1992). With the CSA in effect, the pension plans remained in existence and TWA continued in operation for an additional eight years. During that time, Pichin acted as the sole plan sponsor and contributing sponsor for the purposes of ERISA and the Internal Revenue Code.FN1

FN1. See Plaintiffs' First Amended Complaint ¶ 58.

The pension plans were ultimately terminated effective January 1, 2001 after PBGC received notice from Pichin that a defined "Significant Event" had occurred. The PBGC, after termination of the pension plans, estimated that the Pilots' A-Plan alone was underfunded by approximately $200 million. FN2 In accordance with the CSA, Pichin's termination liability under both TWA pension plans consisted of $240 million to be paid in eight annual payments of $30 million.

FN2. Id. ¶ 69.

B. The First Pilots' Case

Following the termination of the plans, the Air Line Pilots Association, International ("ALPA") and two individual pilots filed suit in this court against PBGC and Pichin. The plaintiffs in that suit claimed that the PBGC had exceeded its statutory authority by terminating the Pilots' A-Plan based on the terms of the CSA, rather than based on ERISA's criteria for involuntary terminations. On cross-motions for summary judgment, the district court held that the neither the termination nor the CSA itself violated ERISA and therefore, actions taken by the PBGC to terminate the Pilots' A-Plan were not unlawful under ERISA. FN3

FN3. See *Air Line Pilots Ass'n, Int'l*, 193 F.Supp.2d at 218-19.

The pilots appealed the district court's decision under the representation of the Allied Pilots Association ("APA").FN4 On appeal, the pilots argued (1) that the PBGC failed to make an administrative determination in 1992 that the TWA pension plans satisfied ERISA's involuntary termination criteria and (2) that even if the

PBGC made a proper determination in 1992, it acted arbitrarily and capriciously by failing to make a second such determination in 2001 before formally terminating the plans. *Allied Pilots Ass'n*, 334 F.3d at 97.

FN4. The APA assumed the ALPA's collective bargaining responsibilities following TWA's acquisition by American Airlines, Inc. in 2001.

The D.C. Circuit affirmed the district court's decision and concluded that the CSA was lawful under ERISA and that the CSA mandated the PBGC's termination of the pension plan upon the occurrence of a Significant Event. In addition, the court held that ERISA authorizes the PBGC to (1) enter into settlement agreements like the one challenged in this case and (2) postpone termination pending the occurrence of a defined event. The court further concluded that PBGC had not acted arbitrarily or capriciously since "the PBGC was obligated to terminate the plans when the Significant Event occurred ...." Id. at 98.

B. The Instant Matter

Following the D.C. Circuit's ruling, the plaintiffs commenced this action against Pichin and the PBGC. The plaintiffs' First Amended Complaint asserts three claims for relief: (1) that termination of the Pilots' A-Plan under the CSA was a transaction to evade liability and thus, Pichin and the Icahn entities are in violation of ERISA § 4069, 29 U.S.C. § 1369; (2) that Pichin, as the sole plan sponsor, contributing sponsor, and plan administrator of the TWA Pension Plans, breached its fiduciary duty to the plan participants and beneficiaries by having engaged in a prohibited transaction under ERISA; and (3) that PBGC's failure to demand or to initiate action to recover the full amount of the unfunded benefit liabilities from Pichin and

the Icahn entities constitutes a breach of the PBGC's fiduciary duty as a plan trustee.

III. Legal Standards

A motion to dismiss under Rule 12(b)(6) tests whether the plaintiff has properly stated a claim upon which relief can be granted. See FED. R. CIV. P. 12(b)(6). The Federal Rules only require that the complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief," FED. R. CIV. P. 8(a)(2), because the complaint "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' " *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

In deciding a 12(b)(6) motion to dismiss the Court will consider the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters which the Court may take judicial notice. *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C.Cir.1997); *Chandamuri v. Georgetown University*, 274 F.Supp.2d 71, 76-77 (D.D.C.2003). The Court must accept as true all well-pleaded factual allegations and grant plaintiff the benefit of all *reasonable* inferences that can be derived from the alleged facts. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The suit may be dismissed for failure to state a claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id.

IV. Analysis

A.

The court will first address the allegation in plaintiffs' complaint that the CSA constitutes a transaction having a principal purpose of evading liability imposed by ERISA § 4062, 29 U.S.C. § 1362 and thereby in violation of ERISA § 4069, 29 U.S.C. § 1369. See Amended Compl. ¶ 81. In accordance with their claim, plaintiffs seek, *inter alia*, (1) a declaratory judgment that the portion of the CSA purporting to relieve Pichin and the Icahn entities from a significant portion of their liability is unlawful under ERISA and therefore void and unenforceable, and (2) an injunction requiring immediate restoration of the Pilots' A-Plan and restitution from Pichin and the Icahn entities of all benefits that were lost by plaintiffs as a result of the alleged unlawful termination of the Pilots' A-Plan in an underfunded status.FN5

FN5. Plaintiffs define the amount of restitution owed as the difference in the pension benefits plaintiffs are currently receiving from PBGC and the pension benefits they were receiving prior to January 1, 2001. See Pls.' Resp. to Def. Pichin's Mot. to Dismiss Pls.' First Am. Compl. at 19 ("Pls.' Resp. to Pichin's Mot. Dismiss").

Section 10 of the CSA provides, *inter alia*, that upon termination of the pension plans, "the liability under Title IV of ERISA of the Icahn sponsor, and all members of its controlled group, shall be limited, individually and collectively, to an obligation to make eight annual payments of $30 million each to the PBGC," commencing eighteen months after the date on which the pension plans are terminated. Plaintiffs argue that under ERISA § 4062, 29 U.S.C. § 1362, "plan sponsors and the members of their

controlled groups are liable, upon plan termination, to pay for the I amount of unfunded benefit liabilities, plus interest from the termination date." Pls.' First Am. Compl. ¶ 48 (emphasis in original). Thus, according to plaintiffs, the $240 million cap on Icahn and Pichin's termination liability under both pension plans constituted a "dormant scheme ··· to evade eighty percent (80%) of their 1992 termination liability ····" Pls.' Resp. to Pichin's Mot. Dismiss at 21.

Section 1362 provides that, in the case of any termination of a single-employer defined benefit plan under ERISA § 4042, 29 U.S.C. § 1342, the contributing sponsor of the plan or a member of such a contributing sponsor's controlled group shall incur joint and several liability for the liability to the corporation and the liability to the designated section 1342 trustee. According to plaintiffs' interpretation of section 1362, "[n]either the PBGC nor any other party to the [CSA] had any lawful authority to forgive or to compromise the liability for unfunded benefit liabilities arising from the Pilots' A-Plan ····" Moreover, plaintiffs' central argument is that the CSA's termination liability cap is unlawful under ERISA because PBGC lacks the statutory authority to compromise the amount of Icahn's § 1362 termination liability.

Plaintiffs' arguments fail under the D.C. Circuit's express confirmation that the PBGC has general authority under ERISA § 4067, 29 U.S.C. § 1367 to enter into liability settlements. As aptly stated by the D.C. Circuit:

The PBGC's general authority to enter into liability settlements comes from ERISA section 4067, which empowers the PBGC "to make arrangements with [plan] sponsors and members of their controlled groups who are or *may become* liable under [the statute] for payment of their liability." As the bankruptcy court found, the PBGC

entered into the CSA pursuant to its section 4067 authority. Under the CSA, Icahn agreed to accept the ongoing role of plan sponsor and to contribute funds to shore up the plans; in return, the PBGC agreed to postpone-perhaps indefinitely-its termination of TWA's plans, to cap Icahn's direct liability at $240 million, and to terminate the plans, upon [Icahn's notification that a significant event occurred]. Each of these promises and counter-promises formed an integral part of the overall negotiated settlement, whose purpose was to prevent termination altogether.

Allied Pilots Ass'n, 334 F.3d at 98-99 (citations omitted). Plaintiffs assert that the D.C. Circuit's interpretation of section 1367 is not controlling in the case at bar. Specifically, plaintiffs characterize the D.C. Circuit's interpretation as mere dicta, rather than binding precedent.

This court disagrees. The D.C. Circuit could not have been clearer in stating that ERISA's authorization of the CSA was a key element to its decision that the termination of the plans was done lawfully. The opinion begins by stating, "Because we conclude that federal law authorizes the PBGC to enter into settlement agreements like the one challenged in this case, we agree with the district court that the PBGC's termination of TWA's pension plans was permissible." *Allied Pilots Ass'n*, 334 F.3d at 95. This court finds that the D.C. Circuit's interpretation of section 1367 authority was central to the court's ruling and part of its holding in the case. As such, this court finds that the D.C. Circuit's holding is binding precedent and controlling in the case at bar. Having found that the D.C. Circuit's holding that "federal law authorizes the PBGC to enter into settlement agreements like the one challenged in this case," is controlling, plaintiffs' claim that the CSA constitutes a prohibited transaction under section 1369 is foreclosed.

Even if this court did not find that the D.C. Circuit's interpretation of PBGC's statutory authority is binding precedent, plaintiffs' claim that Pichin and the Icahn entities violated section 1369 is without merit. Section 1369(a) provides in relevant part:

> If a *principal purpose of any person in entering into any transaction is to evade liability to* which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date of the termination on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date.

29 U.S.C. § 1369(a) (emphasis added). Plaintiffs cite the Third Circuit's interpretation in *Pension Ben. Guar. Corp. v. White Consol. Indus.*, Inc., 998 F.2d 1192, 1200 (3rd Cir.1993) that the enumerated transactions discussed in section 1369 were not limited to "the types of transactions covered to traditional sales of pension funds to another entity." Plaintiffs rely on *White* to support the plaintiffs' contention that "[s]ection 1369 applies to 'any transaction' whose principal purpose is to avoid § 1362 liability" rather than applying only to unilateral efforts to evade liability. Pls.' Resp. to Pichin's Mot. Dismiss at 20.

This court agrees that the clear and unambiguous language in section 1369 applies to persons entering *any transaction* with a *principal purpose of evading liability*. However, this court does not agree that Pichin and the Icahn entities' involvement in the CSA constitute evasion under ERISA.

The CSA at issue constitutes a statutorily authorized transaction between TWA, the pilots' union, Icahn and the Icahn entities, including Pichin, and the PBGC to *settle* ERISA liability. It is not by mistake that Congress issued an express grant of settlement authority in ERISA section 4062(b)(3), 29 U.S.C. § 1362(b)(3). Section 4062(b)(3) provides that "[t]he corporation and any person liable under this section may agree to *alternative arrangements* for the satisfaction of [section 4062] liability to the corporation ...."29 U.S.C. § 1362(b)(3) (emphasis added). In addition, the Supreme Court has made clear that Congress "granted the PBGC discretion to arrange reasonable terms for the payment of [ERISA] liability." See *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 367, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980) (interpreting ERISA § 4067, 29 U.S.C. § 1367). Having concluded that the CSA constitutes a statutorily authorized arrangement to settle unfunded liability, this court rejects plaintiffs' claim that the CSA violates section 1369.

B.

The court now addresses the plaintiffs' second claim that Pichin breached its fiduciary duty when it procured the termination of the Pilots' A-Plan. Plaintiffs assert that as plan sponsor, contributing sponsor, and plan administrator Pichin had a fiduciary duty under ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) to act solely in the interest of the participants and beneficiaries of the plan.FN6 According to plaintiffs, the CSA appointed Pichin a "trustee" under ERISA § 4042(b), 29 U.S.C. § 1342(b). Pls.' Resp. to Pichin's Mot. Dismiss. at 22-23. Under section 1342(d)(3), a trustee that has been appointed under section 1342(b) is "a fiduciary within the meaning of paragraph (21) of section 1002 of [29 U.S.C.]." FN7

FN6. See Pls. First Am. Compl. ¶ 92.

FN7. 29 U.S.C. 1002(21)(A) provides in relevant part that:

[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

As Pichin correctly points out in its reply, the CSA appointed PBGC as the statutory trustee, not Pichin. Section 12.1 of the CSA provides in relevant part that "upon or as soon as practicable after a Non-Standard Termination, all assets and liabilities of the terminated Pension Plans 'will be transferred and delivered to the *PBGC as a statutory trustee* of the terminated pension plans.' " See Pls.' First Am. Compl. ¶ 50 (quoting CSA § 12.1).

Even accepting plaintiffs' allegations as true, Pichin's fiduciary duties as an alleged section 1342 trustee do not extend to Pichin's obligations when acting in the capacity of a settlor. The Supreme Court has held that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." *Lockheed Corp. v. Spink*, 517 U.S. 882, 890, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996). Furthermore, " '[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate [a plan].' " Id. (emphasis added) (quoting *Curtiss-Wright Corp. v. Schoonejongen*,

514 U.S. 73, 78, 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995)) (citing *Adams v. Avondale Industries*, 905 F.2d 943, 947 (6th Cir.1990)). "When employers [or other plan sponsors] undertake those actions, they do not act as fiduciaries, but are analogous to the settlors of a trust." See *Lockheed*, 517 U.S. at 890, 116 S.Ct. 1783 (citations omitted) (citing *Curtiss-Wright*, 514 U.S. at 78, 115 S.Ct. 1223 and *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir.1994)).

In the case at bar Pichin acted not as a fiduciary but as a settlor when it requested that the PBGC terminate the pension plans. When acting in this fashion, Pichin's decisions are not subject to ERISA's fiduciary provisions and thus, Pichin's procurement of the termination cannot be the basis for a claim of fiduciary breach.

C.

Finally, the court will address plaintiffs' third claim that the PBGC should be disqualified as the trustee of the Pilots' A-Plan due to the PBGC's conflicting role as both plan trustee and statutory guarantor. Plaintiffs argue that an independent trustee in the PBGC's position would file suit against the PBGC for breaching its fiduciary duty to protect the interest of the plan participants. Yet, the plaintiffs' main grounds for removal is that the PBGC "will not seek to recover from the Icahn entities any termination liability in excess of the payments set forth in the CSA." See Pls.' Resp. to Def. Pichin's Mot. Dismiss at 24. Essentially, plaintiffs ask this court to disqualify PBGC as plan trustee for breach of fiduciary duty based upon the PBGC's failure to collect the full amount of unfunded benefits.

Having already found the D.C. Circuit's holding that the BGC was authorized to enter into the CSA as binding

precedent, plaintiffs are barred from challenging PBGC's actions taken in compliance with the CSA. Moreover, plaintiffs' claim that an independent trustee should be appointed to resolve the PBGC's conflict of interest should have been raised in the bankruptcy court proceedings and in the *Allied Pilots* litigation.FN8 Accordingly, it is res judicata here.FN9

FN8. ALPA was a party to TWA's bankruptcy proceedings and the Air Line Pilots Ass'n litigation. See *Allied Pilots*, 334 F.3d at 97. Plaintiffs concede that "TWA's Pilots, including the plaintiffs and the members of the Plaintiff Class, were represented for collective bargaining purposes by the Air Line Pilots Association, International (ALPA)." See Pls.' First Am. Compl. ¶ 23. Courts have recognized that unions are in privity with their membership for the purposes of res judicata. See *Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, 285 (2nd Cir.2000) (finding that officers were in privity with the sole and exclusive collective bargaining representative who had brought a prior action challenging the same policy).

FN9. Plaintiffs cite *Harris v. Secretary, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 345 (D.C.Cir.1997) for the proposition that in order for defendants to raise res judicata, it must first be raised in a responsive pleading. However, the D.C. Circuit has since held that affirmative defenses may be raised in a pre-answer motion as in the case at bar. See *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C.Cir.1998) (explaining that "[t]he precise holding of *Harris* is that an affirmative defense not raised by answer cannot be raised in dispositive motions that are filed *post-answer* ") (emphasis added).

V. CONCLUSION

For the reasons stated above, the Court shall **GRANT** defendants' motions to dismiss. The Plaintiffs' First Amended Complaint shall be dismissed with prejudice.

The Court will issue a separate order consistent with this opinion.

ORDER

Upon consideration of defendants' motions to dismiss [# 51 and # 52] Plaintiffs' First Amended Complaint, the opposition to the motions, and reply thereto, the applicable law, and for the reasons set forth in the accompanying Memorandum Opinion issued this date, it is hereby

ORDERED that defendants' motions to dismiss are **GRANTED**; and it is further

ORDERED that Plaintiffs' First Amended Complaint is hereby dismissed with prejudice.

29 U.S.C. § 1302. Pension Benefit Guaranty Corporation

(a) Establishment within Department of Labor

There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation. In carrying out its functions under this subchapter, the corporation shall be administered by the chairman of the board of directors in accordance with policies established by the board. The purposes of this subchapter, which are to be carried out by the corporation, are—

(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,

(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and

(3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.

(b) Powers of corporation

To carry out the purposes of this subchapter, the corporation has the powers conferred on a nonprofit corporation under the District of Columbia Nonprofit Corporation Act [D.C.Code, § 29-501 *et seq.*] and, in addition to any specific power granted to the corporation elsewhere in this subchapter or under that Act, the corporation has the power—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal;

(2) to adopt, alter, and use a corporate seal, which shall be judicially noticed;

(3) to adopt, amend, and repeal, by the board of directors, bylaws, rules, and regulations relating to the conduct of its business and the exercise of all other rights and powers granted to it by this chapter and such other bylaws, rules, and regulations as may be necessary to carry out the purposes of this subchapter;

(4) to conduct its business (including the carrying on of operations and the maintenance of offices) and to exercise all other rights and powers granted to it by this chapter in any State or other jurisdiction without regard to qualification, licensing, or other requirements imposed by law in such State or other jurisdiction;

(5) to lease, purchase, accept gifts or donations of, or otherwise to acquire, to own, hold, improve, use, or otherwise deal in or with, and to sell, convey, mortgage, pledge, lease, exchange, or otherwise dispose of, any property, real, personal, or mixed, or any interest therein wherever situated;

(6) to appoint and fix the compensation of such officers, attorneys, employees, and agents as may be required, to determine their qualifications, to define their duties, and, to the extent desired by the corporation, require bonds for them and fix the penalty thereof, and to appoint and fix the compensation of experts and consultants in accordance with the provisions of section 3109 of Title 5;

(7) to utilize the personnel and facilities of any other agency or department of the United States Government, with or without reimbursement, with the consent of the head of such agency or department; and

(8) to enter into contracts, to execute instruments, to incur liabilities, and to do any and all other acts and things

as may be necessary or incidental to the conduct of its business and the exercise of all other rights and powers granted to the corporation by this chapter.

(c) Omitted

(d) Board of directors; compensation; reimbursement for expenses

The board of directors of the corporation consists of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Commerce. Members of the board shall serve without compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of their duties as members of the board. The Secretary of Labor is the chairman of the board of directors.

(e) Meetings

The board of directors shall meet at the call of its chairman, or as otherwise provided by the bylaws of the corporation.

(f) Adoption of bylaws; amendment, alteration; publication in the Federal Register

As soon as practicable, but not later than 180 days after September 2, 1974, the board of directors shall adopt initial bylaws and rules relating to the conduct of the business of the corporation. Thereafter, the board of directors may alter, supplement, or repeal any existing bylaw or rule, and may adopt additional bylaws and rules from time to time as may be necessary. The chairman of the board shall cause a copy of the bylaws of the corporation to be published in the Federal Register not less often than once each year.

(g) Exemption from taxation

(1) The corporation, its property, its franchise, capital, reserves, surplus, and its income (including, but not limited to, any income of any fund established under section 1305 of this title), shall be exempt from all taxation now or hereafter imposed by the United States (other than taxes imposed under chapter 21 of Title 26, relating to Federal Insurance Contributions Act [26 U.S.C.A. § 3101 *et seq.*], and chapter 23 of Title 26, relating to Federal Unemployment Tax Act [26 U.S.C.A. § 3301 *et seq.*]), or by any State or local taxing authority, except that any real property and any tangible personal property (other than cash and securities) of the corporation shall be subject to State and local taxation to the same extent according to its value as other real and tangible personal property is taxed.

(2) The receipts and disbursements of the corporation in the discharge of its functions shall be included in the totals of the budget of the United States Government. The United States is not liable for any obligation or liability incurred by the corporation.

(h) Advisory committee to corporation

(1) There is established an advisory committee to the corporation, for the purpose of advising the corporation as to its policies and procedures relating to (A) the appointment of trustees in termination proceedings, (B) investment of moneys, (C) whether plans being terminated should be liquidated immediately or continued in operation under a trustee, and (D) such other issues as the corporation may request from time to time. The advisory committee may also recommend persons for appointment as trustees in termination proceedings, make recommendations with respect to the investment of moneys in the funds, and advise the corporation as to whether a plan subject to being

terminated should be liquidated immediately or continued in operation under a trustee.

(2) The advisory committee consists of seven members appointed, from among individuals recommended by the board of directors, by the President. Of the seven members, two shall represent the interests of employee organizations, two shall represent the interests of employers who maintain pension plans, and three shall represent the interests of the general public. The President shall designate one member as chairman at the time of the appointment of that member.

(3) Members shall serve for terms of 3 years each, except that, of the members first appointed, one of the members representing the interests of employee organizations, one of the members representing the interests of employers, and one of the members representing the interests of the general public shall be appointed for terms of 2 years each, one of the members representing the interests of the general public shall be appointed for a term of 1 year, and the other members shall be appointed to full 3-year terms. The advisory committee shall meet at least six times each year and at such other times as may be determined by the chairman or requested by any three members of the advisory committee.

(4) Members shall be chosen on the basis of their experience with employee organizations, with employers who maintain pension plans, with the administration of pension plans, or otherwise on account of outstanding demonstrated ability in related fields. Of the members serving on the advisory committee at any time, no more than four shall be affiliated with the same political party.

(5) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he succeeds. Any vacancy occurring in the office of a member of the advisory committee shall be filled in the manner in which that office was originally filled.

(6) The advisory committee shall appoint and fix the compensation of such employees as it determines necessary to discharge its duties, including experts and consultants in accordance with the provisions of section 3109 of Title 5. The corporation shall furnish to the advisory committee such professional, secretarial, and other services as the committee may request.

(7) Members of the advisory committee shall, for each day (including traveltime) during which they are attending meetings or conferences of the committee or otherwise engaged in the business of the committee, be compensated at a rate fixed by the corporation which is not in excess of the daily equivalent of the annual rate of basic pay in effect for grade GS-18 of the General Schedule, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5.

(8) The Federal Advisory Committee Act does not apply to the advisory committee established by this subsection.

(i) Special rules regarding disasters, etc.

In the case of a pension or other employee benefit plan, or any sponsor, administrator, participant, beneficiary, or other person with respect to such plan, affected by a Presidentially declared disaster (as defined in section 1033(h)(3) of Title 26) or a terroristic or military action (as defined in section 692(c)(2) of Title 26), the corporation may, notwithstanding any other provision of law, prescribe, by notice or otherwise, a period of up to 1 year which may be disregarded in determining the date by which any action is required or permitted to be completed under this chapter. No plan shall be treated as failing to be operated in accordance with the terms of the plan solely as the result of disregarding any period by reason of the preceding sentence.

29 U.S.C. § 1341. Termination of single-employer plans

(a) General rules governing single-employer plan terminations

(1) Exclusive means of plan termination

Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

(2) 60-day notice of intent to terminate

Not less than 60 days before the proposed termination date of a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section, the plan administrator shall provide to each affected party (other than the corporation in the case of a standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of the corporation.

(3) Adherence to collective bargaining agreements

The corporation shall not proceed with a termination of a plan under this section if the termination would violate the terms and conditions of an existing collective bargaining agreement. Nothing in the preceding sentence shall be construed as limiting the authority of the corporation to institute proceedings to involuntarily terminate a plan under section 1342 of this title.

(b) Standard termination of single-employer plans

(1) General requirements

A single-employer plan may terminate under a standard termination only if—

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2) of this section,

(B) the requirements of subparagraphs (A) and (B) of paragraph (2) are met,

(C) the corporation does not issue a notice of noncompliance under subparagraph (C) of paragraph (2), and

(D) when the final distribution of assets occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(2) Termination procedure

(A) Notice to the corporation

As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2) of this section, the plan administrator shall send a notice to the corporation setting forth--

(i) certification by an enrolled actuary—

(I) of the projected amount of the assets of the plan (as of a proposed date of final distribution of assets),

(II) of the actuarial present value (as of such date) of the benefit liabilities (determined as of the proposed termination date) under the plan, and

(III) that the plan is projected to be sufficient (as of such proposed date of final distribution) for such benefit liabilities,

(ii) such information as the corporation may prescribe in regulations as necessary to enable the corporation to make determinations under subparagraph (C), and

(iii) certification by the plan administrator that—

(I) the information on which the enrolled actuary based the certification under clause (i) is accurate and complete, and

(II) the information provided to the corporation under clause (ii) is accurate and complete.

Clause (i) and clause (iii)(I) shall not apply to a plan described in section 412(i) of Title 26.

(B) Notice to participants and beneficiaries of benefit commitments [FN1]

No later than the date on which a notice is sent by the plan administrator under subparagraph (A), the plan administrator shall send a notice to each person who is a participant or beneficiary under the plan—

(i) specifying the amount of the benefit liabilities (if any) attributable to such person as of the proposed termination date and the benefit form on the basis of which such amount is determined, and

(ii) including the following information used in determining such benefit liabilities:

(I) the length of service,

(II) the age of the participant or beneficiary,

(III) wages,

(IV) the assumptions, including the interest rate, and

(V) such other information as the corporation may require.

Such notice shall be written in such manner as is likely to be understood by the participant or beneficiary and as may be prescribed in regulations of the corporation.

(C) Notice from the corporation of noncompliance

(i) In general

Within 60 days after receipt of the notice under subparagraph (A), the corporation shall issue a notice of noncompliance to the plan administrator if—

(I) it determines, based on the notice sent under paragraph (2)(A) of subsection (b) of this section, that there is reason to believe that the plan is not sufficient for benefit liabilities,

(II) it otherwise determines, on the basis of information provided by affected parties or otherwise obtained by the corporation, that there is reason to believe that the plan is not sufficient for benefit liabilities, or

(III) it determines that any other requirement of subparagraph (A) or (B) of this paragraph or of subsection (a)(2) of this section has not been met, unless it further determines that the issuance of such notice would be inconsistent with the interests of participants and beneficiaries.

(ii) Extension

The corporation and the plan administrator may agree to extend the 60-day period referred to in clause (i)

by a written agreement signed by the corporation and the plan administrator before the expiration of the 60-day period. The 60-day period shall be extended as provided in the agreement and may be further extended by subsequent written agreements signed by the corporation and the plan administrator made before the expiration of a previously agreed upon extension of the 60-day period. Any extension may be made upon such terms and conditions (including the payment of benefits) as are agreed upon by the corporation and the plan administrator.

(D) Final distribution of assets in absence of notice of noncompliance

The plan administrator shall commence the final distribution of assets pursuant to the standard termination of the plan as soon as practicable after the expiration of the 60-day (or extended) period referred to in subparagraph (C), but such final distribution may occur only if—

(i) the plan administrator has not received during such period a notice of noncompliance from the corporation under subparagraph (C), and

(ii) when such final distribution occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(3) Methods of final distribution of assets

(A) In general

In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall—

(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or

(ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

(B) Certification to the corporation of final distribution of assets

Within 30 days after the final distribution of assets is completed pursuant to the standard termination of the plan under this subsection, the plan administrator shall send a notice to the corporation certifying that the assets of the plan have been distributed in accordance with the provisions of subparagraph (A) so as to pay all benefit liabilities under the plan.

(4) Continuing authority

Nothing in this section shall be construed to preclude the continued exercise by the corporation, after the termination date of a plan terminated in a standard termination under this subsection, of its authority under section 1303 of this title with respect to matters relating to the termination. A certification under paragraph (3)(B) shall not affect the corporation's obligations under section 1322 of this title.

(c) Distress termination of single-employer plans

(1) In general

A single-employer plan may terminate under a distress termination only if--

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2) of this section,

(B) the requirements of subparagraph (A) of paragraph (2) are met, and

(C) the corporation determines that the requirements of subparagraph (B) of paragraph (2) are met.

(2) Termination requirements

(A) Information submitted to the corporation

As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2) of this section, the plan administrator shall provide the corporation, in such form as may be prescribed by the corporation in regulations, the following information:

(i) such information as the corporation may prescribe by regulation as necessary to make determinations under subparagraph (B) and paragraph (3);

(ii) unless the corporation determines the information is not necessary for purposes of paragraph (3)(A) or section 1362 of this title, certification by an enrolled actuary of—

(I) the amount (as of the proposed termination date and, if applicable, the proposed distribution date) of the current value of the assets of the plan,

(II) the actuarial present value (as of such dates) of the benefit liabilities under the plan,

(III) whether the plan is sufficient for benefit liabilities as of such dates,

(IV) the actuarial present value (as of such dates) of benefits under the plan guaranteed under section 1322 of this title, and

(V) whether the plan is sufficient for guaranteed benefits as of such dates;

(iii) in any case in which the plan is not sufficient for benefit liabilities as of such date--

(I) the name and address of each participant and beneficiary under the plan as of such date, and

(II) such other information as shall be prescribed by the corporation by regulation as necessary to enable the corporation to be able to make payments to participants and beneficiaries as required under section 1322(c) of this title; and

(iv) certification by the plan administrator that—

(I) the information on which the enrolled actuary based the certifications under clause (ii) is accurate and complete, and

(II) the information provided to the corporation under clauses (i) and (iii) is accurate and complete.

Clause (ii) and clause (iv)(I) shall not apply to a plan described in section 412(i) of Title 26.

(B) Determination by the corporation of necessary distress criteria

Upon receipt of the notice of intent to terminate required under subsection (a)(2) of this section and the information required under subparagraph (A), the corporation shall determine whether the requirements of this subparagraph are met as provided in clause (i), (ii), or (iii). The requirements of this subparagraph are met if each

person who is (as of the proposed termination date) a contributing sponsor of such plan or a member of such sponsor's controlled group meets the requirements of any of the following clauses:

(i) Liquidation in bankruptcy or insolvency proceedings

The requirements of this clause are met by a person if--

(I) such person has filed or has had filed against such person, as of the proposed termination date, a petition seeking liquidation in a case under Title 11 or under any similar Federal law or law of a State or political subdivision of a State (or a case described in clause (ii) filed by or against such person has been converted, as of such date, to a case in which liquidation is sought), and

(II) such case has not, as of the proposed termination date, been dismissed.

(ii) Reorganization in bankruptcy or insolvency proceedings

The requirements of this clause are met by a person if--

(I) such person has filed, or has had filed against such person, as of the proposed termination date, a petition seeking reorganization in a case under Title 11 or under any similar law of a State or political subdivision of a State (or a case described in clause (i) filed by or against such person has been converted, as of such date, to such a case in which reorganization is sought),

(II) such case has not, as of the proposed termination date, been dismissed,

(III) such person timely submits to the corporation any request for the approval of the bankruptcy

court (or other appropriate court in a case under such similar law of a State or political subdivision) of the plan termination, and

(IV) the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process and approves the termination.

(iii) Termination required to enable payment of debts while staying in business or to avoid unreasonably burdensome pension costs caused by declining workforce

The requirements of this clause are met by a person if such person demonstrates to the satisfaction of the corporation that--

(I) unless a distress termination occurs, such person will be unable to pay such person's debts when due and will be unable to continue in business, or

(II) the costs of providing pension coverage have become unreasonably burdensome to such person, solely as a result of a decline of such person's workforce covered as participants under all single-employer plans of which such person is a contributing sponsor.

(C) Notification of determinations by the corporation

The corporation shall notify the plan administrator as soon as practicable of its determinations made pursuant to subparagraph (B).

(3) Termination procedure

(A) Determinations by the corporation relating to plan sufficiency for guaranteed benefits and for benefit liabilities

If the corporation determines that the requirements for a distress termination set forth in paragraphs (1) and (2) are met, the corporation shall—

(i) determine that the plan is sufficient for guaranteed benefits (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation,

(ii) determine that the plan is sufficient for benefit liabilities (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation, and

(iii) notify the plan administrator of the determinations made pursuant to this subparagraph as soon as practicable.

(B) Implementation of termination

After the corporation notifies the plan administrator of its determinations under subparagraph (A), the termination of the plan shall be carried out as soon as practicable, as provided in clause (i), (ii), or (iii).

(i) Cases of sufficiency for benefit liabilities

In any case in which the corporation determines that the plan is sufficient for benefit liabilities, the plan administrator shall proceed to distribute the plan's assets, and make certification to the corporation with respect to such distribution, in the manner described in subsection (b)(3) of this section, and shall take such other actions as may be appropriate to carry out the termination of the plan.

(ii) Cases of sufficiency for guaranteed benefits without a finding of sufficiency for benefit liabilities

In any case in which the corporation determines that the plan is sufficient for guaranteed benefits, but further determines that it is unable to determine that the plan is sufficient for benefit liabilities on the basis of the information made available to it, the plan administrator shall proceed to distribute the plan's assets in the manner described in subsection (b)(3) of this section, make certification to the corporation that the distribution has occurred, and take such actions as may be appropriate to carry out the termination of the plan.

(iii) Cases without any finding of sufficiency

In any case in which the corporation determines that it is unable to determine that the plan is sufficient for guaranteed benefits on the basis of the information made available to it, the corporation shall commence proceedings in accordance with section 1342 of this title.

(C) Finding after authorized commencement of termination that plan is unable to pay benefits

(i) Finding with respect to benefit liabilities which are not guaranteed benefits

If, after the plan administrator has begun to terminate the plan as authorized under subparagraph (B)(i), the plan administrator finds that the plan is unable, or will be unable, to pay benefit liabilities which are not benefits guaranteed by the corporation under section 1322 of this title, the plan administrator shall notify the corporation of such finding as soon as practicable thereafter.

(ii) Finding with respect to guaranteed benefits

If, after the plan administrator has begun to terminate the plan as authorized by subparagraph (B)(i) or (ii), the plan administrator finds that the plan is unable, or will be unable, to pay all benefits under the plan which are guaranteed by the corporation under section 1322 of this title, the plan administrator shall notify the corporation of such finding as soon as practicable thereafter. If the corporation concurs in the finding of the plan administrator (or the corporation itself makes such a finding), the corporation shall institute appropriate proceedings under section 1342 of this title.

(D) Administration of the plan during interim period

(i) In general

The plan administrator shall—

(I) meet the requirements of clause (ii) for the period commencing on the date on which the plan administrator provides a notice of distress termination to the corporation under subsection (a)(2) of this section and ending on the date on which the plan administrator receives notification from the corporation of its determinations under subparagraph (A), and

(II) meet the requirements of clause (ii) commencing on the date on which the plan administrator or the corporation makes a finding under subparagraph (C)(ii).

(ii) Requirements

The requirements of this clause are met by the plan administrator if the plan administrator—

(I) refrains from distributing assets or taking any other actions to carry out the proposed termination under this subsection,

(II) pays benefits attributable to employer contributions, other than death benefits, only in the form of an annuity,

(III) does not use plan assets to purchase irrevocable commitments to provide benefits from an insurer, and

(IV) continues to pay all benefit liabilities under the plan, but, commencing on the proposed termination date, limits the payment of benefits under the plan to those benefits which are guaranteed by the corporation under section 1322 of this title or to which assets are required to be allocated under section 1344 of this title.

In the event the plan administrator is later determined not to have met the requirements for distress termination, any benefits which are not paid solely by reason of compliance with subclause (IV) shall be due and payable immediately (together with interest, at a reasonable rate, in accordance with regulations of the corporation).

(d) Sufficiency

For purposes of this section--

(1) Sufficiency for benefit liabilities

A single-employer plan is sufficient for benefit liabilities if there is no amount of unfunded benefit liabilities under the plan.

(2) Sufficiency for guaranteed benefits

A single-employer plan is sufficient for guaranteed benefits if there is no amount of unfunded guaranteed benefits under the plan.

(e) Limitation on the conversion of a defined benefit plan to a defined contribution plan

The adoption of an amendment to a plan which causes the plan to become a plan described in section 1321(b)(1) of this title constitutes a termination of the plan. Such an amendment may take effect only after the plan satisfies the requirements for standard termination under subsection (b) of this section or distress termination under subsection (c) of this section.

29 U.S.C. § 1342. Institution of termination proceedings by the corporation

(a) Authority to institute proceedings to terminate a plan

The corporation may institute proceedings under this section to terminate a plan whenever it determines that—

(1) the plan has not met the minimum funding standard required under section 412 of Title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of Title 26 has been mailed with respect to the tax imposed under section 4971(a) of Title 26,

(2) the plan will be unable to pay benefits when due,

(3) the reportable event described in section 1343(c)(7) of this title has occurred, or

(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

The corporation shall as soon as practicable institute

proceedings under this section to terminate a single-employer plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan. The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section). Notwithstanding any other provision of this subchapter, the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of this subchapter.

(b) Appointment of trustee

(1) Whenever the corporation makes a determination under subsection (a) of this section with respect to a plan or is required under subsection (a) of this section to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) of this section ordering the termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The

corporation may request that it be appointed as trustee of a plan in any case.

(2) Notwithstanding any other provision of this subchapter—

(A) upon the petition of a plan administrator or the corporation, the appropriate United States district court may appoint a trustee in accordance with the provisions of this section if the interests of the plan participants would be better served by the appointment of the trustee, and

(B) upon the petition of the corporation, the appropriate United States district court shall appoint a trustee proposed by the corporation for a multiemployer plan which is in reorganization or to which section 1341a(d) of this title applies, unless such appointment would be adverse to the interests of the plan participants and beneficiaries in the aggregate.

(3) The corporation and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).

(c) Adjudication that plan must be terminated

If the corporation is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund. If the trustee appointed under subsection (b) of this

section disagrees with the determination of the corporation under the preceding sentence he may intervene in the proceeding relating to the application for the decree, or make application for such decree himself. Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) of this section (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle. If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) of this section and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3) of this section. Whenever a trustee appointed under this subchapter is operating a plan with discretion as to the date upon which final distribution of the assets is to be commenced, the trustee shall notify the corporation at least 10 days before the date on which he proposes to commence such distribution.

(3) In the case of a proceeding initiated under this section, the plan administrator shall provide the corporation, upon the request of the corporation, the information described in clauses (ii), (iii), and (iv) of section 1341(c)(2)(A) of this title.

(d) Powers of trustee

(1)(A) A trustee appointed under subsection (b) of this section shall have the power--

(i) to do any act authorized by the plan or this subchapter to be done by the plan administrator or any trustee of the plan;

(ii) to require the transfer of all (or any part) of the assets and records of the plan to himself as trustee;

(iii) to invest any assets of the plan which he holds in accordance with the provisions of the plan, regulations of the corporation, and applicable rules of law;

(iv) to limit payment of benefits under the plan to basic benefits or to continue payment of some or all of the benefits which were being paid prior to his appointment;

(v) in the case of a multiemployer plan, to reduce benefits or suspend benefit payments under the plan, give appropriate notices, amend the plan, and perform other acts required or authorized by subtitle (E) of this subchapter to be performed by the plan sponsor or administrator;

(vi) to do such other acts as he deems necessary to continue operation of the plan without increasing the potential liability of the corporation, if such acts may be done under the provisions of the plan; and

(vii) to require the plan sponsor, the plan administrator, any contributing or withdrawn employer, and any employee organization representing plan participants to furnish any information with respect to the plan which the trustee may reasonably need in order to administer the plan.

If the court to which application is made under subsection (c) of this section dismisses the application with prejudice, or if the corporation fails to apply for a decree under subsection (c) of this section, within 30 days after the date on which the trustee is appointed under subsection (b) of this section, the trustee shall transfer all assets and records of the plan held by him to the plan administrator within 3 business days after such dismissal or the

expiration of such 30-day period, and shall not be liable to the plan or any other person for his acts as trustee except for willful misconduct, or for conduct in violation of the provisions of part 4 of subtitle B of subchapter I of this chapter (except as provided in subsection (d)(1)(A)(v) of this section). The 30-day period referred to in this subparagraph may be extended as provided by agreement between the plan administrator and the corporation or by court order obtained by the corporation.

(B) If the court to which an application is made under subsection (c) of this section issues the decree requested in such application, in addition to the powers described in subparagraph (A), the trustee shall have the power—

(i) to pay benefits under the plan in accordance with the requirements of this subchapter;

(ii) to collect for the plan any amounts due the plan, including but not limited to the power to collect from the persons obligated to meet the requirements of section 1082 of this title or the terms of the plan;

(iii) to receive any payment made by the corporation to the plan under this subchapter;

(iv) to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan;

(v) to issue, publish, or file such notices, statements, and reports as may be required by the corporation or any order of the court;

(vi) to liquidate the plan assets;

(vii) to recover payments under section 1345(a) of this title; and

(viii) to do such other acts as may be necessary to comply with this subchapter or any order of the court and to protect the interests of plan participants and beneficiaries.

(2) As soon as practicable after his appointment, the trustee shall give notice to interested parties of the institution of proceedings under this subchapter to determine whether the plan should be terminated or to terminate the plan, whichever is applicable. For purposes of this paragraph, the term "interested party" means—

(A) the plan administrator,

(B) each participant in the plan and each beneficiary of a deceased participant,

(C) each employer who may be subject to liability under section 1362, 1363, or 1364 of this title,

(D) each employer who is or may be liable to the plan under section part 1 of subtitle E of this subchapter,

(E) each employer who has an obligation to contribute, within the meaning of section 1392(a) of this title, under a multiemployer plan, and

(F) each employee organization which, for purposes of collective bargaining, represents plan participants employed by an employer described in subparagraph (C), (D), or (E).

(3) Except to the extent inconsistent with the provisions of this chapter, or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as those of a trustee under section 704 of Title 11, and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 1002 of this title and under section 4975(e) of Title 26 (except to the extent that the provisions of this subchapter are inconsistent with the requirements applicable under part 4 of subtitle B of subchapter I of this chapter and of such section 4975).

(e) Filing of application notwithstanding pendency of other proceedings

An application by the corporation under this section may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding, or any proceeding to reorganize, conserve, or liquidate such plan or its property, or any proceeding to enforce a lien against property of the plan.

(f) Exclusive jurisdiction; stay of other proceedings

Upon the filing of an application for the appointment of a trustee or the issuance of a decree under this section, the court to which an application is made shall have exclusive jurisdiction of the plan involved and its property wherever located with the powers, to the extent consistent with the purposes of this section, of a court of the United States having jurisdiction over cases under chapter 11 of Title 11. Pending an adjudication under subsection (c) of this section such court shall stay, and upon appointment by it of a trustee, as provided in this section such court shall continue the stay of, any pending mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the plan or its property and any other suit against any receiver, conservator, or trustee of the plan or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the plan or any other suit against the plan.

(g) Venue

An action under this subsection may be brought in the judicial district where the plan administrator resides or does business or where any asset of the plan is situated. A district court in which such action is brought may issue

process with respect to such action in any other judicial district.

(h) Compensation of trustee and professional service personnel appointed or retained by trustee

(1) The amount of compensation paid to each trustee appointed under the provisions of this subchapter shall require the prior approval of the corporation, and, in the case of a trustee appointed by a court, the consent of that court.

(2) Trustees shall appoint, retain, and compensate accountants, actuaries, and other professional service personnel in accordance with regulations prescribed by the corporation.

29 U.S.C. § 1362. Liability for termination of single-employer plans under a distress termination or a termination by corporation

(a) In general

In any case in which a single-employer plan is terminated in a distress termination under section 1341(c) of this title or a termination otherwise instituted by the corporation under section 1342 of this title, any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's controlled group shall incur liability under this section. The liability under this section of all such persons shall be joint and several. The liability under this section consists of—

(1) liability to the corporation, to the extent provided in subsection (b) of this section, and

(2) liability to the trustee appointed under subsection (b) or (c) of section 1342 of this title, to the extent provided in subsection (c) of this section.

(b) Liability to corporation

(1) Amount of liability

(A) In general

Except as provided in subparagraph (B), the liability to the corporation of a person described in subsection (a) of this section shall be the total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan, together with interest (at a reasonable rate) calculated from the termination date in accordance with regulations prescribed by the corporation.

(B) Special rule in case of subsequent insufficiency

For purposes of subparagraph (A), in any case described in section 1341(c)(3)(C)(ii) of this title, actuarial present values shall be determined as of the date of the notice to the corporation (or the finding by the corporation) described in such section.

(2) Payment of liability

(A) In general

Except as provided in subparagraph (B), the liability to the corporation under this subsection shall be due and payable to the corporation as of the termination date, in cash or securities acceptable to the corporation.

(B) Special rule

Payment of so much of the liability under paragraph (1)(A) as exceeds 30 percent of the collective net worth of all persons described in subsection (a) of this section (including interest) shall be made under commercially reasonable terms prescribed by the corporation. The parties involved shall make a reasonable effort to reach agreement on such commercially reasonable terms. Any such terms prescribed by the corporation shall provide for deferral of 50 percent of any amount of liability otherwise payable for any year under this subparagraph if a person subject to such liability demonstrates to the satisfaction of the corporation that no person subject to such liability has any individual pre-tax profits for such person's fiscal year ending during such year.

(3) Alternative arrangements

The corporation and any person liable under this section may agree to alternative arrangements for the satisfaction of liability to the corporation under this subsection.

(c) Liability to section 1342 trustee

A person described in subsection (a) of this section shall be subject to liability under this subsection to the trustee appointed under subsection (b) or (c) of section 1342 of this title. The liability of such person under this subsection shall consist of—

(1) the outstanding balance of the accumulated funding deficiencies (within the meaning of section 1082(a)(2) of this title and section 412(a) of Title 26) of the plan (if any) (which, for purposes of this subparagraph, shall include the amount of any increase in such accumulated funding deficiencies of the plan which would result if all pending applications for waivers of the minimum funding standard

under section 1083 of this title or section 412(d) of Title 26 and for extensions of the amortization period under section 1084 of this title or section 412(e) of Title 26 with respect to such plan were denied and if no additional contributions (other than those already made by the termination date) were made for the plan year in which the termination date occurs or for any previous plan year),

(2) the outstanding balance of the amount of waived funding deficiencies of the plan waived before such date under section 1083 of this title or section 412(d) of Title 26 (if any), and

(3) the outstanding balance of the amount of decreases in the minimum funding standard allowed before such date under section 1084 of this title or section 412(e) of Title 26 (if any), together with interest (at a reasonable rate) calculated from the termination date in accordance with regulations prescribed by the corporation. The liability under this subsection shall be due and payable to such trustee as of the termination date, in cash or securities acceptable to such trustee.

(d) Definitions

(1) Collective net worth of persons subject to liability

(A) In general

The collective net worth of persons subject to liability in connection with a plan termination consists of the sum of the individual net worths of all persons who—

(i) have individual net worths which are greater than zero, and

(ii) are (as of the termination date) contributing sponsors of the terminated plan or members of their controlled groups.

(B) Determination of net worth

For purposes of this paragraph, the net worth of a person is—

(i) determined on whatever basis best reflects, in the determination of the corporation, the current status of the person's operations and prospects at the time chosen for determining the net worth of the person, and

(ii) increased by the amount of any transfers of assets made by the person which are determined by the corporation to be improper under the circumstances, including any such transfers which would be inappropriate under Title 11 if the person were a debtor in a case under chapter 7 of such title.

(C) Timing of determination

For purposes of this paragraph, determinations of net worth shall be made as of a day chosen by the corporation (during the 120-day period ending with the termination date) and shall be computed without regard to any liability under this section.

(2) Pre-tax profits

The term "pre-tax profits" means—

(A) except as provided in subparagraph (B), for any fiscal year of any person, such person's consolidated net income (excluding any extraordinary charges to income and including any extraordinary credits to income) for such fiscal year, as shown on audited financial statements prepared in accordance with generally accepted accounting principles, or

(B) for any fiscal year of an organization described in section 501(c) of Title 26, the excess of income over expenses (as such terms are defined for such organizations under generally accepted accounting principles), before provision for or deduction of Federal or other income tax, any contribution to any single-employer plan of which such person is a contributing sponsor at any time during the period beginning on the termination date and ending with the end of such fiscal year, and any amounts required to be paid for such fiscal year under this section. The corporation may by regulation require such information to be filed on such forms as may be necessary to determine the existence and amount of such pre-tax profits.

(e) Treatment of substantial cessation of operations

If an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections 1363, 1364, and 1365 of this title shall apply.

29 U.S.C.A. § 1367. Recovery of liability for plan termination

The corporation is authorized to make arrangements with contributing sponsors and members of their controlled groups who are or may become liable under section 1362, 1363, or 1364 of this title for payment of their liability, including arrangements for deferred payment of amounts of liability to the corporation accruing as of the termination

date on such terms and for such periods as the corporation deems equitable and appropriate.

(2)

Supreme Court, U.S.
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No. 06-145

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Petitioners,

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT PICHIN CORPORATION'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

During a Chapter 11 proceeding involving a bankrupt airline, the Pension Benefit Guaranty Corporation ("PBGC") entered into a court-approved Comprehensive Settlement Agreement that was negotiated in 1992 among all affected parties, including (i) the debtor airline, (ii) the PBGC, (iii) the collective bargaining representatives of the airline's employees, and (iv) representatives of the airline's controlling shareholder. That settlement was the linchpin of a successful Chapter 11 reorganization of the debtor airline that enabled the airline's employees to keep their jobs, provided that the airline's existing defined benefit pension plans would continue in operation and receive funding from the reorganized entity and related entities (as they did for many years), provided for the future termination of the pension plans upon the occurrence of certain potential defined "Significant Events," and provided that, in the event of such termination, the related entities' termination payments would be capped at $240 million.

Did the PBGC have authority under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), to enter into the Comprehensive Settlement Agreement?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The following are parent companies or any publicly held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Pichin Corporation:

Arnos Corp.

Unicorn Associates Corporation

ACF Industries Holding Corp.

Highcrest Investors Corp.

Buffalo Investors Corp.

Starfire Holding Corporation

NM Holding Corporation.

These representations are made in order that Justices of this Court may determine the need for recusal. As such, we have erred on the side of caution and have construed the term "parent" broadly. Pichin Corporation does not admit that any listed entities are parent corporations for purposes other than this Disclosure Statement.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
STATUTORY PROVISIONS INVOLVED	1
COUNTER-STATEMENT OF THE CASE	2
A. The CSA Is Adopted As Part Of TWA's Bankruptcy Re-Organization In 1992	3
B. The PBGC Terminates The Plan And The Pilots' Union Files A Lawsuit Attacking The CSA	7
C. The Pilots File A Second Lawsuit Attacking The CSA	7
D. The Court Of Appeals Issues The 2003 *Allied Pilots* Decision Upholding The PBGC's Authority To Enter Into The CSA	8
E. The Pilots Amend Their Complaint And File A Third Lawsuit Attacking The CSA, And The District Court Dismisses Both Cases	10
F. The Court Of Appeals Affirms The District Court On Both Grounds And Adopts Its Reasoning	11
REASONS FOR DENYING THE WRIT	11
I. THERE IS NO CONFLICT AMONG THE CIRCUITS	12

TABLE OF CONTENTS—Continued

Page

II. THE UNIQUE PROCEDURAL CIRCUMSTANCES OF THIS CASE ESTABLISH SUBSTANTIAL EQUITABLE DEFENSES THAT RENDER IT AN INAPPROPRIATE VEHICLE FOR ADDRESSING THE ISSUE OF THE PBGC'S SETTLEMENT AUTHORITY 13

III. ERISA AUTHORIZED THE CSA'S TERMINATION LIABILITY SETTLEMENT PROVISIONS 18

A. The Statutory Language Authorized The Settlement Agreement 18

B. The Legislative History Further Supports The PBGC's Statutory Authority To Enter Into Liability Settlements Like the CSA 22

CONCLUSION 25

APPENDIX

TABLE OF AUTHORITIES

CASES — Page

Adams v. Pension Benefit Guar. Corp.,
332 F. Supp. 2d 231 (D.D.C. 2004),
aff'd 170 Fed. Appx. 142 (D.C. Cir. 2006) 3, 10, 11
Adams v. Pension Benefit Guar. Corp.,
170 Fed. Appx. 142 (D.C. Cir. 2006)..... 3, 11
Aerojet-Gen. Corp. v. Askew,
511 F.2d 710 (5th Cir. 1975)..... 15
Air Line Pilots Ass'n, Int'l v.
Pension Benefit Guar. Corp.,
193 F. Supp. 2d 209 (D.D.C. 2002),
aff'd sub nom, Allied Pilots Ass'n v.
Pension Benefit Guar. Corp.,
334 F.3d 93 (D.C. Cir. 2003)..... 3, 4, 7
Allied Pilots Ass'n v.
Pension Benefit Guar. Corp.,
334 F.3d 93 (D.C. Cir. 2003)..... *passim*
Brown v. PBGC,
821 F. Supp. 26 (D.D.C. 1993)..... 22
Commodity Futures Trading Comm'n v. Schor,
478 U.S. 833 (1986)..... 24
Colautti v. Franklin,
439 U.S. 379 (1979)..... 20
Costello v. United States,
365 U.S. 265 (1961)..... 15
Ethnic Employees of the Library of Cong. v.
Boorstin,
751 F.2d 1405 (D.C. Cir. 1985)..... 15
Expert Elec., Inc. v. Levine,
554 F.2d 1227 (2d Cir. 1977)..... 14
Fed. Power Comm'n v. Colo. Interstate Gas Co.,
348 U.S. 492 (1955)..... 16, 17
First Am. Disc. Corp. v.
Commodity Futures Trading Comm'n,
222 F.3d 1008 (D.C. Cir. 2000)..... 16

TABLE OF AUTHORITIES—Continued

Page

Fotta v. Trustees of the United Mine Workers of Am., Health & Ret. Fund, 165 F.3d 209 (3d Cir. 1998) 16

Frito Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.), 10 F.3d 944 (2d Cir. 1993) 18

Halliburton Serv. v. Crystal Oil Co. (In re Crystal Oil Co.), 854 F.2d 79 (5th Cir. 1988) 18

In re AOV Indus. Inc., 792 F.2d 1140 (D.C. Cir. 1986) 17

In re Continental Airlines, 91 F.3d 553 (3d Cir. 1996) 17, 18

In re Smart World Techs., LLC, 423 F.3d 166 (2d Cir. 2005) 20

In re Specialty Equip. Cos., 3 F.3d 1043 (7th Cir. 1993) 18

In re: UAL Corp., 428 F.3d 677 (7th Cir. 2005) 12

Indep. Bankers Ass'n of Am. v. Heimann, 627 F.2d 486 (D.C. Cir. 1980) 16

Johnson v. Zerbst, 304 U.S. 458 (1938) 16

Kaneb Servs., Inc. v. FSLIC, 650 F.2d 78 (5th Cir. 1981) 16

Monahan v. N.Y. City Dep't of Corr., 214 F.3d 275 (2d Cir. 2000) 15

Nevada v. United States, 463 U.S. 110 (1983) 14

New York Air Brake Corp. v. Gen. Signal Corp., 873 F. Supp. 747 (N.D.N.Y. 1995) 20, 21

TABLE OF AUTHORITIES—Continued

Page

Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.), 988 F.2d 322 (2d Cir. 1993) 17

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 14

Pension Benefit Guar. Corp. v. Icahn, et al., No. 4:92-cv-00371-DBB (W.D. Mo. 1992) 4

Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990) 21, 24

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 21

South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986) 20

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064 (9th Cir. 2003) 15

Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.), 652 F.2d 793 (9th Cir. 1981) 18

Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996) 15

United States v. Menasche, 348 U.S. 528 (1955) 20

Utah Power & Light Co. v. Interstate Commerce Comm'n, 764 F.2d 865 (D.C. Cir. 1985) 15

Wells Fargo Bank, N.A. v. F.D.I.C., 310 F.3d 202 (D.C. Cir. 2002) 21

West v. Gibson, 527 U.S. 212 (1999) 21

TABLE OF AUTHORITIES—Continued

Page

W. Coal Traffic League v. Interstate Commerce Comm'n, 735 F.2d 1408 (D.C. Cir. 1984) 15

STATUTES

Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, Title XI, 100 Stat. 82 23

Retirement Protection Act of 1994, Pub. L. No. 103-465, Title VII(F), 108 Stat. 4809 23

Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 ..... 23, 24

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* 2

29 U.S.C. § 1302(a) 22

29 U.S.C. § 1302(b)(1) 20

29 U.S.C. § 1304(f) 22, 23

29 U.S.C. § 1322(b)(3)(B) 4

29 U.S.C. § 1362 ..... 8, 18, 19, 20, 23

29 U.S.C. § 1367 ..... 8, 11, 12, 21

29 U.S.C. § 1369 ..... 1, 11

RULES AND REGULATIONS

29 C.F.R. § 4022.22 & app. D. (2005) 4

S. Ct. R. 10 ..... 11, 12

LEGISLATIVE MATERIALS

H.J. Res.157, 102d Cong. § 214, 105 Stat. 1701 (1991) 4

MISCELLANEOUS

Black's Law Dictionary (6th ed., abridged, 1991) .. 19

TABLE OF AUTHORITIES—Continued

Page

Pension Benefit Guaranty Corporation Fiscal Year 1992 Annual Report to Congress 13
Pension Benefit Guaranty Corporation Fiscal Year 1993 Annual Report To Congress 13
Pension Benefit Guaranty Corporation Fiscal Year 1994 Annual Report To Congress 13

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STATUTORY PROVISIONS INVOLVED

A relevant statutory provision of ERISA, 29 U.S.C. § 1369,[1] is set forth on page 1 of the Appendix ("App."). Other pertinent statutes are contained in the Appendix to the Petition.

[1] Consistent with the approach employed in the Petition, this brief cites relevant provisions of ERISA according to their section numbers as codified in title 29 of the United States Code, rather than the section numbers in the enacted statute.

COUNTER-STATEMENT OF THE CASE

The Petition for Writ of Certiorari filed by seven former Trans World Airlines, Inc. ("TWA") pilots (the "Pilots" or "Petitioners") involves yet another belated attack on the provisions of a court-approved Comprehensive Settlement Agreement ("CSA") which was negotiated in 1992 by the Pilots' collective bargaining representative, TWA, the Pension Benefit Guaranty Corporation ("PBGC"), and others, as part of TWA's successful bankruptcy reorganization.[2]

In 1992-1993, the Pilots, through their union, the Air Line Pilots Association, International ("ALPA"), entered into the CSA to induce TWA's then-owner Carl Icahn to fund TWA's bankruptcy reorganization and sponsor TWA's pension plans, including the Retirement Plan for Pilots of Trans World Airlines, Inc. ("Plan" or "Pilots' Plan"). ALPA signed the CSA on behalf of the Pilots, who all were active TWA pilots at the time. (C.A. App. at 79-85.) ALPA warranted that it had received all necessary authorization from its membership to sign the CSA. (C.A. App. at 207.) Icahn and several Icahn-affiliated entities (including respondent Pichin Corporation) (collectively, "Icahn"), the PBGC, TWA and TWA's other unions also signed the CSA, and warranted their authority to do so. (C.A. App. at 44-47, 203-09, 244-58.)

The United States Bankruptcy Court for the District of Delaware approved the CSA, which was the cornerstone of TWA's successful Plan of Reorganization. *Infra* § A. That reorganization saved the Pilots' jobs. Moreover, during the next eight years, the Pilots' statutory pension benefits guaranteed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA") increased by up to 44% and more than half a billion dollars in assets were allocated to TWA's pension plans. *Infra* § A.

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[2] The CSA is reproduced (without exhibits) in the parties' Joint Appendix filed in the Court of Appeals ("C.A. App.") at 181-270.

In December 2000, when Pichin, the Icahn-affiliated entity serving as Plan sponsor pursuant to the CSA, exercised its CSA right to request termination of TWA's pension plans, ALPA filed a lawsuit challenging the very agreement it had signed eight years earlier on behalf of all TWA pilots. The District Court rejected ALPA's challenge to the CSA, and the D.C. Circuit affirmed, expressly holding that "federal law authorizes . . . settlement agreements like the one challenged in this case . . . ." *Allied Pilots Ass'n v. Pension Benefit Guar. Corp.*, 334 F.3d 93, 95 (D.C. Cir. 2003) ("*Allied Pilots*"). No further review of that judgment was sought.

Notwithstanding the D.C. Circuit's decision upholding the CSA in *Allied Pilots*, Petitioners persisted in asserting a separate, belated challenge to the CSA. Both the District Court and the Court of Appeals dismissed Petitioners' follow-on lawsuits, holding both (i) that the lawsuits were nothing more than an attempted end-run around the *Allied Pilots* decision, *Adams v. Pension Benefit Guar. Corp.*, 332 F. Supp. 2d 231, 236 (D.D.C. 2004), *aff'd* 170 Fed. Appx. 142 (D.C. Cir. 2006), Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 4, 13, and (ii) that the PBGC had full authority under ERISA to settle its claims against TWA and Icahn by entering into the CSA, including the CSA's provision capping Icahn's payments upon Plan termination at $240 million, *Adams*, 332 F. Supp. 2d at 236-37; 170 Fed. Appx. at 142, Pet. App. at 4, 14-15. The Petition seeks review of that judgment.

A. The CSA Is Adopted As Part Of TWA's Bankruptcy Re-Organization In 1992.

TWA filed for Chapter 11 bankruptcy on January 31, 1992. *Air Line Pilots Ass'n, Int'l v. Pension Benefit Guar. Corp.*, 193 F. Supp. 2d 209, 212 (D.D.C. 2002) (Urbina, J.), *aff'd sub nom. Allied Pilots*, 334 F.3d 93. The PBGC promptly announced its intention to terminate TWA's pension plans,

including the Pilots' Plan, and to pursue TWA and Icahn for an alleged $1.124 billion in termination liability. *Id.* at 212-13. Icahn disputed the alleged liability on the ground that Congress's 1991 amendment of ERISA[3] specifically to hold Icahn personally liable for underfunding of TWA's pension plans violated the U.S. Constitution. (*See* C.A. App. at 394.) In response, the PBGC filed a lawsuit seeking a declaratory judgment that the 1991 amendment was constitutional. *Id.; see also Pension Benefit Guar. Corp. v. Icahn, et al.*, No. 4:92-cv-00371-DBB (W.D. Mo. 1992).[4]

As TWA's reorganization efforts developed, two inter-related obstacles emerged. *First*, although the various TWA unions offered to make wage and benefit concessions, (C.A. App. at 389-90, 502-03), TWA failed to raise $200 million in needed operating capital. (C.A. App. at 395.) *Second*, the PBGC's announced intention to terminate the plans and the size of its alleged claim deterred potential sources of financing for TWA. It also threatened the TWA pilots' pensions, which, in the event of Plan termination, would have been capped by the statutory limit on the PBGC's pension guarantee. In 1992, that limit was $28,000, an amount below many of the pilots' expected retirement benefits.[5] Because of their keen interest in this issue, TWA's pilots conditioned their wage and benefit concessions on satisfactory resolution of the PBGC's claim. (C.A. App. at 394, 504-05.)

The CSA negotiated among all affected parties eliminated these obstacles to TWA's reorganization. The CSA provided, among other things, that:

Icahn would loan $200 million to TWA;

---

[3] *See* H.J. Res. 157, 102d Cong. § 214, 105 Stat. 1701, 1718-19 (1991).

[4] Upon motion by the PBGC, the District Court dismissed the PBGC's declaratory judgment action on November 23, 1992, shortly after the parties had successfully negotiated the major terms of the CSA.

[5] *See* 29 U.S.C. § 1322(b)(3)(B); 29 C.F.R. § 4022.22 & app. D (2005).

> TWA would contribute $300 million to TWA's pension plans;
>
> TWA's pension plans would not be terminated immediately, but instead would be sponsored by an Icahn entity (Pichin), which was responsible for minimum funding requirements in excess of TWA's $300 million payment;
>
> If certain defined "Significant Events" occurred in the future, the PBGC would terminate the TWA pension plans upon a request from Pichin; and
>
> TWA's future potential ERISA liability in the event of termination would be extinguished, and Icahn's termination payments were fixed at no more than $240 million.

Allied Pilots, 334 F.3d at 96, 98 (citing the CSA).

The PBGC expressly represented and warranted to Icahn that the CSA "shall constitute legal, valid, and binding contracts . . . enforceable against the PBGC" and "will not violate any provision of Title IV of ERISA," (C.A. App. at 204-05), and provided a formal opinion by its General Counsel that the CSA "constitute[s] legal, valid and binding obligations of PBGC" and "do[es] not conflict with Title IV of ERISA . . . ." (C.A. App. at 687.) Similarly, ALPA represented and warranted that its execution of the CSA was "duly authorized by all necessary action, including where necessary action of its membership," which included the Pilots.[6] (C.A. App. at 207.) In agreeing to the CSA, Icahn relied on its text and on these express statements of authority by the PBGC and the Pilots' union.

---

[6] Each of the Pilots was an active TWA pilot when ALPA, the exclusive collecting bargaining agent for all active TWA pilots, signed the CSA. (C.A. App. at 26, 79-85.) Accordingly, each of the Pilots is bound by that agreement.

The Bankruptcy Court approved the CSA in December 1992 after finding that it was essential to a successful TWA reorganization:

> it would be an extremely difficult task to propose a plan absent resolution of those matters that have preceded [the CSA] as well as this settlement. Absent the negotiations that have taken place and the resolutions, it would be likely that any plan that would be proposed could not *possibly* be confirmed as originally presented.

(C.A. App. at 530) (emphasis supplied). The Bankruptcy Court also held that:

> [The Icahn $200 million] financings are critical to the continued operation of TWA's business and the ability of TWA to propose a feasible plan of reorganization.

(C.A. App. at 486.)

When the Bankruptcy Court approved the CSA, ***none*** of the TWA pilots or their union objected to it. (C.A. App. at 533-684.)[7] Instead, they reaped the benefits of their bargain. As the cornerstone of TWA's reorganization, the CSA enabled TWA to continue operations and the Pilots to remain employed. TWA pilots who were already retired or who chose to retire at the time of the CSA received (and still receive to this day) their full benefits. (*See* C.A. App. at 218).[8] When active pilots—including Petitioners—later retired, Pichin's Plan sponsorship allowed them to receive

---

[7] Indeed, ALPA advocated for the CSA. (*See* C.A. App. at 532). The CSA and the negotiations leading to it were no secret. They were widely reported in the press at the time. (C.A. App. at 716-22.)

[8] The Petition misleadingly states that termination of the Plan "resulted in the immediate reduction of the monthly benefit paid to petitioners and other retired TWA pilots." Pet. at 4. This statement is inaccurate to the extent it includes pilots who were already retired or who chose to retire at the time the CSA was signed.

timely payment of full benefits under the Plan for several years, rather than the lower amount that would have been guaranteed by the PBGC had the Plan been terminated in 1992. *See Allied Pilots*, 334 F.3d at 99. Finally, because the PBGC's guarantee cap, by law, increases annually, the eight-year postponement in Plan termination increased the PBGC's statutory guarantee maximum at the time of termination by 44% over the guaranteed amount in 1992. *Id.*

B. The PBGC Terminates The Plan And The Pilots' Union Files A Lawsuit Attacking The CSA.

Eight years after the Bankruptcy Court approved the CSA, Pichin requested that the PBGC terminate TWA's pension plans as required by the CSA because "Significant Events" had occurred. The PBGC terminated the plans effective January 1, 2001. *Allied Pilots*, 334 F.3d at 96.

As the Pilots alleged in their complaint, several active and retired TWA pilots then urged their union, ALPA, to file a lawsuit challenging the PBGC's termination of the Pilots Plan pursuant to the CSA as violative of ERISA. (C.A. App. at 47 ¶ 88.) The District Court granted summary judgment for defendants PBGC and Pichin, and the D.C. Circuit affirmed. *Air Line Pilots Ass'n, Int'l v. Pension Benefit Guar. Corp.*, 193 F. Supp. 2d at 220-21; *Allied Pilots*, 334 F.3d at 99.

C. The Pilots File A Second Lawsuit Attacking The CSA.

Six weeks after the District Court's dismissal order, the Pilots filed ***another*** lawsuit—*Adams I*, the subject of this Petition—challenging the CSA and Plan termination. (C.A. App. at 15-76.) The Pilots challenged the PBGC's Plan termination and several terms of the CSA, including its provisions capping Icahn's termination payments at $240 million. The Pilots also asserted claims against ALPA, their own collective bargaining representative, arguing that ALPA had

breached duties to them by signing the CSA and by not seeking preliminary relief to enjoin Plan termination. (C.A. App. at 73 ¶ 178.) The District Court, recognizing that the outcome of the *Allied Pilots* appeal could resolve the new, nearly identical lawsuit, stayed *Adams I* pending the appeal. (C.A. App. at 76.) Notwithstanding the potential impact of the D.C. Circuit's rulings on their rights, the Pilots never sought to intervene in *Allied Pilots*, or even to file a brief *amicus curiae*.

D. The Court Of Appeals Issues The 2003 *Allied Pilots* Decision Upholding The PBGC's Authority To Enter Into The CSA.

In *Allied Pilots*, the D.C. Circuit affirmed the District Court's dismissal and decisively rejected the belated ERISA attack on the CSA and the PBGC's termination of the pension plan. The scope of the PBGC's settlement authority under 29 U.S.C. §§ 1362 and 1367 was specifically discussed in the briefs submitted to the D.C. Circuit. The PBGC's briefs discussed the PBGC's settlement authority and argued that the CSA's provisions were authorized by ERISA, specifically sections 1367 and 1362(b)(3). *See* Docket No. 02-5144 (1/31/03) (Brief of Appellee PBGC) at 7-8 & 19. Sections 1362 and 1367 were quoted fully in the statutory appendix to the PBGC's brief. *Id.* The pilots' union appellant expressly challenged the PBGC's interpretation of section 1367. *See* Docket No. 02-5144 (2/14/03) (Reply Brief of Appellants) at 8-9, n.2.

It was in this context that the Court of Appeals in *Allied Pilots* held, at the very beginning of its opinion:

> ***Because*** we conclude that federal law authorizes the PBGC to enter into ***settlement agreements like the one challenged in this case***, we agree with the district court that the PBGC's termination of TWA's pension plans was permissible.

Allied Pilots, 334 F.3d at 95 (emphases added). Thus, the Court of Appeals ruled that Plan termination was legal "***[b]ecause***" it first "conclud[ed]" that the CSA, which included the provision capping Pichin's payments at $240 million, was authorized by ERISA. *Id.* (emphasis added). The Court further stated that

> ***The PBGC's general authority to enter into liability settlements comes from ERISA section 4067***, which ***empowers*** the PBGC "to make arrangements with [plan] sponsors and members of their controlled groups who are or *may become* liable under [the statute] for payment of their liability." As the bankruptcy court found, ***the PBGC entered into the CSA pursuant to its section 4067 authority.*** Under the CSA, Icahn agreed to accept the ongoing role of plan sponsor and to contribute funds to shore up the plans; in return, the PBGC agreed to postpone—perhaps indefinitely—its termination of TWA's plans, to cap Icahn's direct liability in the event of termination at $240 million, and to terminate the plans, upon request, if Icahn received unfavorable tax treatment concerning his status as plan sponsor. ***Each of these promises and counter-promises formed an integral part of the overall negotiated settlement, whose purpose was to prevent termination altogether.***

Id. at 98-99 (internal citations omitted) (bold italic emphases added) (alteration in original).

Having found the CSA fully in accord with federal law, the Court of Appeals then rejected "the pilots' claim that the PBGC acted arbitrarily and capriciously" in terminating the plan pursuant to the CSA. *Id.* at 98. In sum, the Court of Appeals held *both* that the CSA was lawful under ERISA *and* that it mandated the PBGC's termination of the pension plan.

E. The Pilots Amend Their Complaint And File A Third Lawsuit Attacking The CSA, And The District Court Dismisses Both Cases.

Despite the Court of Appeals' clear holdings in *Allied Pilots* upholding the CSA and Plan termination pursuant to it, the Pilots persisted in their new lawsuit by amending their complaint. (C.A. App. at 77-114.) The Pilots also filed another lawsuit in the District Court seeking a writ of mandamus against the PBGC, alleging that "[t]he limitation on the Termination Liability of Pichin and its controlled group as set forth in the [CSA] . . . violates [ERISA] and is, therefore, void and unenforceable." (C.A. App. at 164 ¶ 21.) In other words, the Pilots' fundamental claim in both cases was that the PBGC had no authority under ERISA to settle TWA's and Icahn's pension liabilities unless it did so by "settling" for payment of 100% of the amount that the PBGC estimated as the plan's unfunded liability—a drastically different arrangement than the negotiated terms of the CSA and of many other settlements the PBGC has negotiated with plan sponsors. *See* footnote 9 and § III.B, *infra*.

On August 25, 2004, the District Court dismissed both cases, ruling on two alternative grounds.

First, the District Court held that *stare decisis* barred the Pilots' claims. It held that the *Allied Pilots* holding that "'federal law authorizes the PBGC to enter into settlement agreements like the one challenged in this case'" was "binding precedent" that foreclosed the Pilot's claims that the liability settlement violated ERISA. *Adams*, 332 F. Supp. 2d at 236 (quoting *Allied Pilots*, 334 F.3d at 95).

Second, and alternatively, the District Court held that, even if *stare decisis* did not bar the Pilots' claims, they lacked substantive merit. *Id.* The District Court specifically analyzed and rejected the Pilots' contention that the termination liability settlement in the negotiated CSA was a prohibited

"transaction to evade liability" within the meaning of 29 U.S.C. § 1369(a). *Id.* at 236-37. It also held that ERISA's provisions authorizing the PBGC to agree to "alternative arrangements for the satisfaction of [ ] liability" was "an express grant of settlement authority" that authorized the CSA, including the $240 million settlement payment cap. *Id.* at 237. And it found further authority for the settlement in 29 U.S.C. § 1367, upon which the Court of Appeals in *Allied Pilots* had relied in upholding the implementation of the CSA. *Id.* The District Court therefore concluded that "the CSA constitutes a statutorily authorized arrangement to settle unfunded liability . . . ." *Id.*

F. The Court Of Appeals Affirms The District Court On Both Grounds And Adopts Its Reasoning.

The Pilots appealed and, after full briefing on the merits and oral argument, the Court of Appeals affirmed the judgment of the District Court in a unanimous *per curiam* Judgment issued on January 27, 2006. The Court of Appeals, like the District Court, did not rely solely upon *stare decisis* grounds, but also addressed and rejected the Pilots' arguments on the merits. The Court of Appeals Judgment ordered

> . . . that the judgment of the district court be affirmed for the reasons stated in the opinion of the district court, except insofar as the district court based Part IV.C of its decision upon the alternative ground of res judicata.

Adams v. Pension Benefit Guar. Corp., 170 Fed. Appx. 142 (D.C. Cir. 2006) (unpublished) (citation omitted), Pet. App. at 3-4. Petitioners sought rehearing *en banc*, which was denied by a *per curiam* order issued on April 28, 2006. Pet. App. at 1-2.

REASONS FOR DENYING THE WRIT

The Petition should be denied. Petitioners have identified no compelling reason to grant it under the Court's well established criteria for granting certiorari. *See* S. Ct. R. 10.

Moreover, as explained below, the unique procedural circumstances of this case render it a poor vehicle for considering the issue raised by Petitioners—which, in any event, was correctly resolved by the Court of Appeals. Finally, Congress's recent enactment of comprehensive pension reform legislation—including special provisions relating to airlines—refutes Petitioners' suggestion that review by this Court is needed to assure the solvency and proper functioning of the pension system under ERISA.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Petitioners do not suggest that any conflict among the circuits justifies review by this Court—and for good reason. Two other decisions have addressed the issue of the PBGC's settlement authority under ERISA in the context of a comprehensive bankruptcy reorganization, where (as here) the debtor, the PBGC, and representatives of the debtor's employees all participated fully in the negotiations. In both cases the courts concluded, consistent with the judgment below, that the PBGC has authority to settle unfunded benefit liabilities claims. *See Allied Pilots*, 334 F.3d at 95, 98-99; *see also In re: UAL Corp.*, 428 F.3d 677 (7th Cir. 2005) (citing *Allied Pilots* and holding that the PBGC has authority to enter into agreement with United Airlines to settle unfunded benefit liabilities claims under "29 U.S.C. § 1367, which enables PBGC to seize opportunities to avoid inefficient litigation and to increase the certainty of its recoveries").

Nor do Petitioners suggest any conflict with any decision of this Court. *See* S. Ct. R. 10(c). Their sole claim is that the decision below, which upheld the PBGC's exercise of settlement authority that the agency duly reported to Con-

gress[9], and which Congress never has questioned or sought to curtail, conflicts with Congress's intent in enacting ERISA.

II. THE UNIQUE PROCEDURAL CIRCUMSTANCES OF THIS CASE ESTABLISH SUBSTANTIAL EQUITABLE DEFENSES THAT RENDER IT AN INAPPROPRIATE VEHICLE FOR ADDRESSING THE ISSUE OF THE PBGC'S SETTLEMENT AUTHORITY.

Petitioners filed this case in May 2002—nine years after the Bankruptcy Court approved the CSA, and after the District Court granted summary judgment against the ALPA

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[9] *See, e.g.*, Pension Benefit Guaranty Corporation Fiscal Year 1994 Annual Report to Congress, at 9 (C.A. App. at 851) (describing settlement of PBGC's $900 million termination liability claim against Pan Am Corporation for $110 million); Pension Benefit Guaranty Corporation Fiscal Year 1993 Annual Report to Congress, at 13 (C.A. App. at 854) (describing settlement of PBGC's $700 million termination liability claim against Continental Airlines for its joint and several liability for Eastern Air Lines' terminated pension plans for $21 million in cash, an airplane trust worth $70-75 million, and approximately 5% of new Continental common stock); *id.* at 13 (C.A. App. at 854) (describing settlement of TWA's and Icahn's liability and the CSA's terms, including settlement of the $1 billion claim for the amounts set forth in the CSA); *id.* at 14 (C.A. App. at 855) (describing settlement of PBGC's $220 million termination liability claim against CF&I Corporation for business interests, cash, and other consideration estimated at a value of $33 million); Pension Benefit Guaranty Corporation Fiscal Year 1992 Annual Report to Congress, at 15 (C.A. App. at 858) (describing CSA: "The total present value of the TWA and Icahn commitments is $259-410 million. In return for the minimum funding and termination commitments, PBGC has released TWA and the Icahn group from any further liability for TWA's pension plans."); *id.* at 16-17 (C.A. App. at 859-860) (describing potential settlement with New Valley Corporation: "In May, PBGC and New Valley reached an agreement in principle under which PBGC would terminate a New Valley plan that is underfunded by about $420 million. Under the agreement, PBGC anticipates receiving a distribution of cash and securities worth between $200 and $210 million.").

plaintiffs in the *Allied Pilots* lawsuit. *See* Pet. at 4, 7; *supra* pp. 6-7. Because of Petitioners' delay in asserting their claims, they are subject to a variety of legal and equitable defenses, summarized below, that Pichin raised in the District Court and the Court of Appeals.

For that reason, this case is a poor vehicle for resolving the question presented by Petitioners. As Petitioners themselves assert, the PBGC has entered into other recent settlements in airline bankruptcy cases and additional airline bankruptcies are pending. *See* Pet. at 18-19. Even assuming that the PBGC's ongoing exercise of its settlement authority—which is long-standing and has regularly been reported to Congress, which has never challenged it, *see infra* pp. 23-24—is worthy of review, this case is not the appropriate case in which to do so.

The defenses asserted by Pichin include the following:

Res judicata. The doctrine of *res judicata* bars a plaintiff from asserting legal theories that were brought or that ***could have been*** brought in a prior suit by the same party or those in privity with it. *Nevada v. United States*, 463 U.S. 110, 129-30 (1983). In the court below, Pichin argued that the decision in *Allied Pilots* was *res judicata* barring the claims that are the subject of the Petition. *See* Docket No. 04-5333 (9/21/2005) (Brief of Appellee/Cross-Appellant Pichin Corporation) at 29-33. Because both cases arose out of the CSA and challenged its legality, they indisputably involve the "same cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

The "same parties" requirement similarly is satisfied because *res judicata* binds not only persons literally party to the first suit but also those in privity with them. *Nevada*, 463 U.S. at 129-30. "[O]ne whose interests were adequately represented by another vested with the authority of representation is bound by the judgment . . . ." *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1233 (2d Cir. 1977). Applying this

principle to bar the Pilots from re-litigating claims brought unsuccessfully by their union is plainly appropriate here. *See Monahan v. N.Y. City Dep't of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000).[10] The Pilots all are former TWA pilots and present or former ALPA members who maintained in their original complaint that ALPA had a ***duty*** to represent them with respect to Plan termination.[11]

Alternatively, the "same parties" requirement also is satisfied under the principle of virtual representation. "[A] person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *Aerojet-Gen. Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975); *see also Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996). The Court of Appeals, which has not recognized the doctrine of virtual representation,[12] declined to affirm that portion of the District Court's judgment which held that *res judicata* barred one of Petitioners' claims. *See* Pet. App. at 3-4. However, were this Court to grant the writ, Pichin will assert *res judicata* as an alternative ground upon which the judgment below should be affirmed.

Laches. A claim is barred by laches where there has been "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961).

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[10] *See also Utah Power & Light Co. v. Interstate Commerce Comm'n*, 764 F.2d 865, 871 (D.C. Cir. 1985) (member of public utility association barred by participation of association in prior suit); *W. Coal Traffic League v. Interstate Commerce Comm'n*, 735 F.2d 1408, 1410-11 (D.C. Cir. 1984); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003).

[11] (C.A. App. at 79-85 ¶¶ 4-10; C.A. App. at 18-25 ¶¶ 6-13; C.A. App. at 51-52.)

[12] *See Ethnic Employees of the Library of Cong. v. Boorstin*, 751 F.2d 1405, 1411 n.8 (D.C. Cir. 1985).

Equitable defenses including laches apply in ERISA actions. *Fotta v. Trustees of the United Mine Workers of Am., Health & Ret. Fund*, 165 F.3d 209, 214 (3d Cir. 1998).

This suit presents a textbook case for application of laches. *First*, Petitioners were not "diligent." They entered the CSA to induce Icahn's funding and to avoid Plan termination in 1992. Only after benefiting from the CSA for eight years did Petitioners challenge its legality. *Second*, there has been prejudice to Icahn, who relied on the CSA provisions Petitioners belatedly challenge when he complied with the CSA's requirements that he loan $200 million to TWA and assume sponsorship of the pension plan. (*See* C.A. App. at 184-86.) "Equity will not protect a party that through years of silence has created an impression of acquiescence that has led others to make substantial financial commitments." *Indep. Bankers Ass'n of Am. v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980).

Waiver. For similar reasons, Petitioners waived any challenge to the terms of the CSA when they failed to object to it in 1992-93. Waiver is an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Petitioners were creditors in TWA's bankruptcy and, through their union, parties to the CSA. Yet neither Petitioners nor their union objected to the CSA on the grounds Petitioners belatedly have raised in this lawsuit.

Estoppel. "Under the doctrine of equitable estoppel, 'a party with full knowledge of the facts, which accepts the benefits of a transaction, contract, statute, regulation, or order may not subsequently take an inconsistent position to avoid the corresponding obligations or effects.'" *First Am. Disc. Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008, 1016 (D.C. Cir. 2000) (quoting *Kaneb Servs., Inc. v. FSLIC*, 650 F.2d 78, 81 (5th Cir. 1981)). Equitable estoppel applies even to claims that challenge a federal agency's statutory authority. *See Fed. Power Comm'n v. Colo. Inter-*

state Gas Co., 348 U.S. 492, 502 (1955) (where agency conditioned merger approval on exclusion of certain losses from "cost of service" surcharges, the merged company was estopped from challenging agency's enforcement of the exclusion terms because it "cannot now be allowed to attack an officially approved condition of the merger while retaining at the same time all of its benefits"). Having accepted the benefits of the CSA, including preservation of their jobs and substantial increases in guaranteed pension benefits, Petitioners are equitably estopped from challenging it now.

Equitable mootness. Because Petitioners' claims would upset the CSA, which was the cornerstone of the TWA bankruptcy reorganization, equitable mootness bars their lawsuit. The equitable mootness doctrine bars a party from appealing or challenging a bankruptcy court's order when (i) no stay of that order has been obtained or diligently pursued, (ii) the reorganization plan has been substantially consummated, and (iii) the relief sought in a successful appeal would upset a portion of the confirmed and consummated reorganization plan. *In re AOV Indus. Inc.*, 792 F.2d 1140, 1147-49 (D.C. Cir. 1986). Equitable mootness is not an Article III consideration, but a balancing of equitable and prudential factors. *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (en banc). It poses a bar when, "even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 325 (2d Cir. 1993).

Because Petitioners did not challenge, let alone seek a stay of, the Bankruptcy Court's Confirmation Order or the Order approving the CSA, (C.A. App. at 533-684), a "strong presumption of mootness" applies to their claims. *AOV*, 792 F.2d at 1149. Moreover, effective and fair relief simply is not possible without "unravel[ing] intricate transactions" and

"knock[ing] the props out from under the authorization for every transaction that has taken place . . . ." *Frito Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952-53 (2d Cir. 1993) (quoting *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 797 (9th Cir. 1981)). The Bankruptcy Court ruled that "the terms of the [CSA] . . . are each integral and mutually interdependent components of a compromise and settlement," (C.A. App. at 483-84), and that the Icahn $200 million financing was "*critical* to the continued operation of TWA's business and the ability of TWA to propose a feasible plan of reorganization." (C.A. App. at 486) (emphasis supplied). Icahn's $200 million loan and his assumption of the pension plans were premised on the validity of the CSA's Plan termination provisions. Petitioners and the beneficiaries of other TWA pension plans have now received their benefits and are not proposing to return them. TWA, the pre-CSA sponsor of the Plan and post-CSA Benefits Administrator, (C.A. App. at 214), has been absorbed into American Airlines. Even if it were possible to unwind the CSA thirteen years after it was approved by the Bankruptcy Court, the disruption caused by such unwinding would be immense, and any relief to Petitioners would be inequitable. *See Continental Airlines*, 91 F.3d at 565-66; *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1048-49 (7th Cir. 1993); *Halliburton Serv. v. Crystal Oil Co. (In re Crystal Oil Co.)*, 854 F.2d 79, 81 (5th Cir. 1988).

III. ERISA AUTHORIZED THE CSA'S TERMINATION LIABILITY SETTLEMENT PROVISIONS.

A. The Statutory Language Authorized The Settlement Agreement.

The PBGC's agreement to settle its claim against TWA and Icahn for unfunded benefit liabilities is supported by express language in ERISA authorizing the PBGC to make "arrangements for the *satisfaction* of liability . . . ." 29 U.S.C. § 1362(b)(3) (emphasis added). The term "satis-

faction" is not limited only to full payment, but means "[t]he performance of a *substituted* obligation in return for the discharge of the original obligation." *Black's Law Dictionary* (6th ed., abridged, 1991) (emphasis added). The PBGC may, and did, "substitute" an alternative obligation—in this case, all of Icahn's counter-promises recited in the CSA, including immediate cash contributions—to conclude that there had been "satisfaction" of its (disputed) claim against Icahn and TWA for unfunded benefit liabilities.

Indeed, in 1992 when the PBGC, TWA, Icahn, and the unions agreed to the CSA, it certainly was not clear that the PBGC *was* settling for less than 100% of liability. The PBGC's $1.124 billion claim was its *estimate* of the unfunded benefit liabilities of TWA's pension plans. Whether that estimate was the actual amount of ERISA liability was a question for litigation—as was the issue of whether any amount that was ultimately adjudicated to be an unfunded liability and that could not be recovered from TWA was recoverable from Icahn. Moreover, if the pension plans never terminated after TWA's reorganization, or if estimated unfunded benefit liabilities were less than $240 million upon termination, the PBGC *would* get a full recovery. The same issue would arise if, for example, the PBGC accepted securities in lieu of cash (which ERISA expressly permits, *see* 29 U.S.C. § 1362(b)(2)(A)), and those securities later substantially decreased in value. The Pilots' reading of the statute would require the agency to have perfect foresight.

The PBGC's authority to settle for less than full estimated liability also derives from the structure of 29 U.S.C. § 1362(b). That section, which addresses a plan sponsor's liability to the PBGC upon termination, has three subsections: "(1) Amount of liability"; "(2) Payment of liability"; and "(3) Alternative arrangements." Placing subsection (3)'s "alternative arrangements for the satisfaction of liability" clause outside the more specific subsection discussing means for "payment" of liabil-

ity, indicates that the PBGC's authority to make "alternative arrangements" is *in addition to* and *separate from* the more limited "payment" terms in Section 1362(b)(2). In Section 1362(b)(2)(B), Congress provided that the PBGC ***must*** offer deferred payment to plan sponsors. 29 U.S.C. § 1362(b)(2)(B) ("Any such terms prescribed by the corporation ***shall*** provide for deferral . . . .") (emphasis added). To read the separate section for "alternative arrangements" to mean that the PBGC is authorized *only* to offer "deferred payment"—a term not mentioned in subsection 1362(b)(3)—would wrongly render subsection 1362(b)(3) duplicative and superfluous. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) ("It is an 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'") (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks and citation omitted). In contrast, interpreting "alternative arrangements" to include authority for the CSA's terms for an immediate cash infusion into the plans, a new plan sponsor, guaranteed termination liability payments, and continuation of the plans as "element[s] of a liability settlement aimed at preventing termination altogether," *Allied Pilots*, 334 F.3d at 98, gives meaning to each subsection of Section 1362.

Moreover, other provisions of ERISA also authorized the CSA. *First*, 29 U.S.C. § 1302(b)(1) expressly provides that the PBGC may "sue and be sued," which is an implicit authorization to settle. *See, e.g., In re Smart World Techs., LLC*, 423 F.3d 166, 174-75 (2d Cir. 2005) (finding that trustee's statutory power to sue and be sued "presumably includes the derivative power to settle suits"); *New York Air Brake Corp. v. Gen. Signal Corp.*, 873 F. Supp. 747, 753 (N.D.N.Y. 1995) ("[I]t is inherent in the adversarial system in which this country operates, that parties to litigation or

dispute hold the authority to settle that litigation or dispute outside the confines of the court at any time before, during, or after the conduct of the proceedings."). *Second*, 29 U.S.C. § 1367 broadly authorizes the PBGC to "make arrangements with contributing sponsors and members of their controlled groups who are or may become liable under section 1362, 1363, or 1364 of this title for payment of their liability, including arrangements for deferred payment of amounts of liability to the corporation accruing as of the termination date on such terms and for such periods as the corporation deems equitable and appropriate." This broad language, which recognizes that the PBGC may make arrangements "including"—but not limited to—arrangements for deferred payment, is broad enough to encompass settlements of contested claims in the context of a bankruptcy reorganization. *See West v. Gibson*, 527 U.S. 212, 217 (1999) ("[T]he preceding word 'including' makes clear that the authorization is not limited to the specified remedies there mentioned . . . .").

The PBGC's interpretation of ERISA to authorize the CSA, including the $240 million payment cap, was the most reasonable construction of the statute. Moreover, that expert interpretation of ERISA is entitled to deference. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 648 (1990) (applying *Chevron* deference to the PBGC's decision to restore terminated pension plan).[13] In ERISA, Congress gave the PBGC a "broad" "grant of authority," *LTV*, 496 U.S. at 648, to (1) "encourage the continuation and maintenance of

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[13] In light of the PBGC's longstanding and consistent interpretation of its settlement authority, as well as the plain statutory language quoted above, this Court need not decide whether *Chevron* deference applies to the PBGC's actions in order to affirm. Because the PBGC is "charged with administering this highly detailed regulatory scheme," this Court should extend considerable weight to the PBGC's "'body of experience and informed judgment'" concerning the statute it enforces. *Wells Fargo Bank, N.A. v. F.D.I.C.*, 310 F.3d 202, 208 (D.C. Cir. 2002) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

voluntary private pension plans for the benefit of their participants," (2) "provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries," and (3) "maintain [plan sponsor] premiums . . . at the lowest level consistent with carrying out [PBGC's] obligations under [Title IV of ERISA]." 29 U.S.C. § 1302(a). The PBGC was uniquely positioned to determine how it could most effectively carry out these sometimes competing statutory duties in 1992. *See Brown v. PBGC*, 821 F. Supp. 26, 31 (D.D.C. 1993) (noting need to defer to the PBGC in light of its arguably competing statutory duties). It chose to perform those duties by entering into the CSA, which permitted the confirmation of the TWA reorganization plan and uninterrupted pension payments to Plan beneficiaries for nearly a decade. This Court should extend deference to that complex decision.

B. The Legislative History Further Supports The PBGC's Statutory Authority To Enter Into Liability Settlements Like the CSA.

The Petitioners wrongly assert that the legislative history of ERISA demonstrates that the PBGC exceeded its statutory authority by entering into the CSA. To the contrary, the legislative history evidences Congress's approval of liability settlements like the CSA.

The Pilots' reliance on the now-defunct Section 1304(f) provisions is misplaced. Pet. at 14-17. While ERISA, as originally enacted, specifically granted the PBGC temporary transition authority to remove recently terminated plans from the operation of the new statute's complicated provisions, this does not mean that other provisions of the statute did not grant the PBGC broad authority to enter into liability settlements. Congress understandably sought to avoid disrupting settled expectations that could be affected by a new, comprehensive regulatory scheme by specifically providing

that the brand new regulatory agency would have maximum flexibility during the initial implementation of ERISA.

Importantly, however, and as the Pilots concede, in 1986 Congress repealed 29 U.S.C. § 1304(f)(4) and ERISA's other moribund emergency provisions. Pet. at 15 n.7 (citing Pub. L. No. 99-272, Title XI, § 11016(c)(6), April 7, 1986, 100 Stat. 82). During that comprehensive restructuring of ERISA, Congress reinforced the PBGC's settlement authority by adding the express statutory language codified at Section 1362(b)(3) authorizing the PBGC to reach—in addition to deferral of payments under subsection (b)(2)—alternative "arrangements for the satisfaction" of termination liability. Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, Title XI, § 11011(a)(2), 100 Stat. 82, 253-57. The PBGC signed the CSA ***six years later***. The repealed temporary provisions of ERISA are inapposite.

Moreover, the PBGC's interpretation of ERISA to give the agency authority to compromise termination liability amounts has been longstanding, public, and ***expressly*** reported to Congress each year. *See* C.A. App. at 849-60 and footnote 9, *supra*. If, as Petitioners suggest, Congress intended to require the PBGC to settle for the full amount of the PBGC's estimated liability, one would have expected Congress to remedy such persistent flouting of legislative intent—particularly when Congress comprehensively reviewed and amended ERISA in 1994 and again in 2006 to remedy underfunding of the PBGC's reserves. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780; Retirement Protection Act of 1994, Pub. L. No. 103-465, Title VII(F), 108 Stat. 4809, 5012-50.

Petitioners' suggestion that review is needed to correct the PBGC's reading of ERISA and thereby rescue the nation's pension system is belied by Congress's recent enactment of comprehensive pension reform legislation that does not diminish the settlement authority that the PBGC repeatedly

has exercised and reported to Congress. Although Congress's stated purpose in revisiting ERISA was to once again address the PBGC's growing deficit, nothing in the recent amendments restricted or otherwise limited the PBGC's settlement authority. To the contrary, the Pension Protection Act of 2006 includes special provisions intended to reduce the pension burden on the airline industry. *See* Pub. L. No. 109-280, § 402, 120 Stat. 780, 922 *et seq.*

"[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (internal quotation marks and citation omitted); *see also LTV*, 496 U.S. at 650 (where "Congress was aware of the action taken by the PBGC" and did not amend ERISA, "[t]he conclusion that Congress thought the PBGC was properly exercising its authority is at least as plausible as any other").

Congress's acquiescence in the PBGC's consistent interpretation of ERISA is understandable, since Petitioners' proposed reading would harm the very workers ERISA was enacted to protect. Petitioners' reading of the statute would force the PBGC to litigate every termination liability case, thereby wasting an enormous amount of resources that otherwise would be used to pay guaranteed benefits and foreclosing the possibility of termination liability settlements that—because of the pitfalls of litigation and the uncertainty of judgment collection—would benefit all parties, including plan participants. Moreover, the prolonged litigation that inevitably would arise in bankruptcy cases involving huge pension plans where the PBGC is a major creditor would foreclose Chapter 11 reorganization of distressed companies and force their liquidation. It is inconceivable that Congress intended such an expensive, socially disruptive result.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

29 U.S.C. § 1369

Treatment of transactions to evade liability; effect of corporate reorganization.

(a) Treatment of transactions to evade liability

If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date of the termination on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date. This subsection shall not cause any person to be liable under this subtitle in connection with such plan termination for any increases or improvements in the benefits provided under the plan which are adopted after the date on which the transaction referred to in the preceding sentence becomes effective.

(b) Effect of corporate reorganization

For purposes of this subtitle, the following rules apply in the case of certain corporate reorganizations:

(1) Change of identity, form, etc.

If a person ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the person to whom this subtitle applies.

(2) Liquidation into parent corporation

If a person ceases to exist by reason of liquidation into a parent corporation, the parent corporation shall be treated as the person to whom this subtitle applies.

(3) Merger, consolidation, or division

If a person ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the person to whom this subtitle applies.